CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER AND FRANK DAILY, ETC., PETITIONERS,

vs.

ROBERT CAIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 24, 1929

CERTIORARI GRANTED DECEMBER 2, 1929

(34,588)

(34,588)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER AND FRANK DALY, ETC., PETITIONERS,

vs.

ROBERT CAIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, Southern New York	1	1
Summons (omitted in printing)	1	
Complaint	3	1
Answer of Walker and Daly	11	5
Answer of Alpha Steamship Corporation	15	7
Bill of particulars	18	8
Opinion, Mack, J., on motion for new trial	22	10
Order denying motion for new trial	26	12
Judgment	28	13
Bill of exceptions	30	14
Appearances of counsel	30	14
Plaintiff's opening	31	14
Defendant's opening	34	16
Testimony of Robert Cain	36	17
Dr. David T. Bishop	122	81
Dr. William T. Powers	142	97
James B. Stewart	149	103
Vine H. Smith	171	120

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1929

	Original	Print
Motions to dismiss	178	126
Testimony of Nelser A. Woodbury	185	130
Matthew Pankor	220	156
Burnett C. Collins	242	174
Matthew Pankor (recalled)	260	187
Roy R. Jackson	271	195
Frederick Fairley	326	236
Thoville Smith	342	248
Colloquy re testimony of Charles Stenmark	373	271
Testimony of Milton Berliner	374	271
Robert Cain (recalled)	388	282
James B. Stewart (recalled)	393	285
Matthew Pankor (recalled)	399	290
Motion to dismiss	402	292
Motion to reopen case	403	292
Testimony of John J. Nork	404	293
Robert Cain (recalled)	444	324
Charge to jury	446	326
Requests to charge	464	336
Colloquy between court and jury	472	341
Verdict	474	342
Defendant's Exhibit "A"—Report of personal injuries	475	342
Defendant's Exhibit "B"—Statement of James B. Stewart	477	344
Stipulation re printing of exhibits	479	345
Stipulation and order settling bill of exceptions	480	345
Notice of appeal	481	346
Petition for appeal and order allowing same	483	347
Assignments of error	485	348
Supersedeas bond on appeal....(omitted in printing)..	497	
Cost bond on appeal.....(" " ")..	502	
Citation .....(" " ")..	507	
Stipulation re transcript of record	508	355
Clerk's certificate.....(omitted in printing)..	509	
Proceedings in the United States circuit court of appeals, second circuit	510	355
Opinion, Swan, J	510	355
Decree	516	366
Clerk's certificate.....(omitted in printing)..	518	
Order allowing certiorari	519	367

[fols. a-1 & 2] Summons, in usual form, omitted in printing.

[fol. 3]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

ROBERT CAIN, Plaintiff,

against

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER, and Frank Daly, Copartners, Doing Business under the Firm Name and Style of Walker & Daly, Defendants

COMPLAINT

Plaintiff, complaining of the defendants, alleges:

First. Upon information and belief that at the times hereinafter mentioned, the defendant Alpha Steamship Corporation was and is now a foreign corporation organized and existing under the laws of the State of New Jersey, doing business in the State of New York.

Second. That at all times hereinafter mentioned, the plaintiff was and is now a citizen of the Kingdom of Great Britain and is now a resident of the Borough of Manhattan, City, State and Southern District of New York.

[fol. 4] Third. Upon information and belief that at the times hereinafter mentioned, the defendant Alpha Steamship Corporation owned and operated a certain vessel known as the S. S. Alpha, engaged in foreign commerce upon the high seas.

Fourth. Upon information and belief that at the times hereinafter mentioned, the defendants William H. A. Walker and Frank Daly were co-partners, doing business under the firm name and style of Walker & Daly, and were in possession and control for themselves or as agents of the defendant Alpha Steamship Corporation of the said vessel.

Fifth. That at the times hereinafter mentioned, the plaintiff was employed by the defendants as a seaman on said vessel.

Sixth. That at the times hereinafter mentioned, one Jackson was in the employ of the defendants as an officer of the said vessel, to wit, the Second Assistant Engineer, and that the said Jackson, as such officer, had jurisdiction and authority from the defendants to maintain discipline upon the said vessel and that he, as such officer, had immediate jurisdiction and authority over the plaintiff.

Seventh. That on or about the 6th day of February, 1927, while the said vessel was in navigable waters in the Republic of Venezuela, South America, the said Jackson, without cause or provocation, violently struck and assaulted the [fol. 5] plaintiff, and deliberately and with great force struck plaintiff twice upon the head with a wrench or pipe or other metal instrument, whereby the plaintiff sustained injuries hereinafter set forth.

Eighth. That the act of the said Jackson was done in the exercise of the authority delegated to him by the defendants as aforesaid and was within the scope of his employment and in the course of his duties as said officer of the vessel and for the purpose of enforcing and maintaining the discipline of the vessel; and that the said Jackson was required by the defendants, among his other duties as said officer, to maintain discipline upon said vessel.

Ninth. That by reason of the said assault, plaintiff sustained great bodily injury and shock, and lost the vision of his left eye, together with severe accompanying pain and suffering, and injury to the nerves and nervous system, by reason of which the plaintiff was confined to the hospital for many weeks; that further, by reason of the premises, plaintiff has been and will be permanently prevented from attending to his usual duties and occupation and will necessarily expend great sums of money for medical attention and medicines and has sustained injuries, some of which, as plaintiff is informed and verily believes, are or may be permanent, by reason of which his earning capacity will be permanently and materially reduced.

Tenth. That by reason of the premises the plaintiff has [fol. 6] sustained damage in the sum of Fifty thousand ($50,000) Dollars.

As and for a second cause of action, plaintiff alleges:

Eleventh. Repeats and realleges each and every allegation contained in paragraphs designated "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the complaint, with the same force and effect as if hereinafter fully set forth.

Twelfth. That the plaintiff's said injuries were caused by reason of the carelessness and negligence of the defendants in failing to protect the plaintiff from assault by the said Jackson and in failing to exercise care and diligence in preventing such assault although the defendants had knowledge of all the circumstances in ample time so to do.

As and for a third cause of action, plaintiff alleges:

Thirteenth. Repeats and realleges each and every allegation contained in paragraphs designated "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the first cause of action with the same force and effect as if hereinafter fully set forth.

Fourteenth. That the defendants, with full knowledge of [fol. 7] the assault by the said Jackson upon the plaintiff as above stated. and with full knowledge of all the circumstances thereof, acquiesced in said assault and failed and refused to punish and discipline the said Jackson.

As and for a fourth cause of action, plaintiff alleges:

Fifteenth. Repeats and realleges each and every allegation contained in paragraphs designated "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the first cause of action, with the same force and effect as if hereinafter fully set forth.

Sixteenth. That the defendants, with full knowledge of the assault by the said Jackson upon the plaintiff as above stated, and with full knowledge of all the circumstances

thereof, did by their agents, servants and employees coerce and intimidate the plaintiff and did compel him by such coercion and intimidation, while the said ship was on the high seas and while the plaintiff was incapacitated and sick by reason of said assault, to sign a statement that the aforesaid injuries were sustained by a fall while the plaintiff was intoxicated, which said statement was and is wholly untrue.

As and for a fifth cause of action, plaintiff alleges:

Seventeenth. Repeats and realleges each and every alle- [fol. 8] gation contained in paragraphs designated "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the first cause of action, with the same force and effect as if hereinafter fully set forth.

Eighteenth. That is was the duty of the defendants, through the master of said vessel to enter in the official logbook of the said vessel a statement of the assault by the said Jackson and to report the same and to surrender the said Jackson to the proper authorities when the said vessel reached the Port of New York.

Nineteenth. That the master of the said vessel had actual knowledge of the said assault at or about the time of the commission thereof.

Twentieth. Upon information and belief that the defendants and the said master of the vessel neglected to note the said assault in the official logbook of said vessel, or to make any entry in said log relating to plaintiff's injury, and failed and neglected to report the same and to surrender the said Jackson to the proper authorities when the said vessel reached the Port of New York, and failed to use due diligence in the premises, which neglect and failure resulted in the escape of the said Jackson.

Twenty-first. That the neglect and failure of the defendants as above stated hindered, impaired and impeded the [fol. 9] rights of the plaintiff and was in violation of Sections 20 and 22, Chapter 28 of the Act of Congress of December 21st, 1898 (U. S. Code, Title 46, Section 702), and of Section 9 of Chapter 153 of Act of Congress of March

4th, 1915 (U. S. Code, Title 46, Section 712), and of the acts amendatory thereof.

As and for a sixth cause of action, plaintiff alleges:

Twenty-second. Repeats and realleges each and every allegation contained in paragraphs designated "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth," "Twelfth," "Fourteenth" and "Sixteenth" of the complaint with the same force and effect as if hereinafter fully set forth.

Twenty-third. That the acts and conduct of the defendants, their agents, servants and employees, as above stated, were in violation of the plaintiff's rights as a seaman under the Acts of Congress of December 21st, 1898, Chapter 28, and of March 14th, 1915, Chapter 153, the latter known as the Seamon's Act and acts amendatory thereof, and in particular, Section 22 of Chapter 28 of the Act of December 21st, 1898, and Section 9 of Chapter 153 of Act of March 4th, 1915 (U. S. Code, Title 46, Section 712).

Wherefore plaintiff demands judgment against the defendants for the sum of Fifty thousand ($50,000.00) Dol-
[fol. 10] lars, together with the costs and disbursements of this action.

Thomas J. Cuff, Attorney for Plaintiff, 51 Chambers Street, New York City.

Duly sworn to by Robert Cain. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted.]

ANSWER OF DEFENDANT WALKER & DALY

The defendant, Walker & Daly, by its attorneys, Hatch & Wolfe, answers the plaintiff's complaint and respectfully alleges:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraphs

of the complaint numbered "First," "Second" and "Third" of the First Cause of Action.

Second. Denies the allegations contained in paragraphs of the complaint numbered "Sixth," "Seventh," "Eighth," "Ninth" and "Tenth" of the First Cause of Action.

Third. Denies the allegations contained in paragraphs [fol. 12] of the complaint numbered "Eleventh" and "Twelfth" of the Second Cause of Action.

Fourth. Denies the allegations contained in paragraphs of the complaint numbered "Thirteenth" and "Fourteenth" of the Third Cause of Action.

Fifth. Denies the allegations contained in paragraphs of the complaint numbered "Fifteenth" and "Sixteenth" of the Fourth Cause of Action.

Sixth. Denies the allegations contained in paragraphs of the complaint numbered "Eighteenth," "Nineteenth," "Twentieth" and "Twenty-first" of the Fifth Cause of Action.

Seventh. Denies the allegations contained in paragraphs "Twenty-second" and "Twenty-third" of the Sixth Cause of Action.

For a first separate and complete defense to the alleged causes of action, defendant upon information and belief alleges:

Eighth. That at all the material times referred to in the complaint, the Steamship "Alpha" was in all respects seaworthy, properly equipped, manned and supplied, and that any injury suffered by the plaintiff, as alleged in paragraph of the complaint numbered "Seventh," was not due or contributed to by any unseaworthiness on the part of the said vessel, or to the negligence, want of care or default on the [fol. 13] part of this defendant, its agents, officers, servants or others for whom it may be responsible.

For a second separate and complete defense to the alleged causes of action, defendant upon information and belief alleges:

Ninth. That any injury suffered by the plaintiff, as alleged in the paragraph of the complaint numbered "seventh," was due wholly or in part by want of care, default or negligence of the plaintiff, or to the provocation and aggressive conduct of the plaintiff and not to any want of care, default or negligence on the part of this defendant, its officers, agents, servants or employees or others for whom it may be responsible.

Wherefore defendant Walker & Daly, demands judgment, dismissing the complaint herein, together with the costs and disbursements of this action.

Hatch and Wolfe, Attorneys for Defendant Walker & Daly.

Office & P. O. Address: 27 William Street, Borough of Manhattan, New York City.

To Thomas J. Cuff, Esq., Attorney for Plaintiff, 51 Chambers Street, New York City.

[fol. 14] *Duly sworn to by W. H. A. Walker. Jurat omitted in printing.*

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT ALPHA STEAMSHIP CORPORATION

The defendant, Alpha Steamship Corporation, by its attorneys, Hatch and Wolfe, answers the plaintiff's complaint and respectfully alleges:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "Second" of the First Cause of Action.

Second. Denies the allegations contained in paragraphs of the complaint numbered "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth" of the First Cause of Action.

Third. Denies the allegations contained in paragraphs "Eleventh" and "Twelfth" of the Second Cause of Action, of the complaint.

[fol. 16] Fourth. Denies the allegations contained in paragraphs of the complaint numbered "Thirteenth" and "Fourteenth" of the Third Cause of Action.

Fifth. Denies the allegations contained in paragraphs of the complaint numbered "Fifteenth" and "Sixteenth" of the Fourth Cause of Action.

Sixth. Denies the allegations contained in paragraphs of the complaint numbered "Seventeeth", "Eighteenth", "Nineteenth", "Twentieth" and "Twenty-first" of the Fifth Cause of Action.

Seventh. Denies the allegations contained in paragraphs "Twenty-second"' and "Twenty-third" of the Sixth Cause of Action of the complaint herein.

Wherefore defendant Alpha Steamship Corporation demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Hatch and Wolfe, Attorneys for Defendant Alpha Steamship Corporation.

Office & P. O. Address: 27 William Street, Borough of Manhattan, New York City.

To Thomas J. Cuff, Esq., Attorney for Plaintiff, 51 Chambers Street, New York City.

[fol. 17] *Duly sworn to by W. H. A. Walker. Jurat omitted in printing.*

[fol. 18] In United States District Court

[Title omitted]

Bill of Particulars

Plaintiff, for his bill of particulars, alleges:

First. The assault was committed between midnight and 1:00 a. m. on or about February 6th, 1927.

Second. The assault was committed at the deck entrance to the engine room.

Third. The plaintiff believes that the instrument with which he was assaulted was a steel wrench or other implement wholly or partly of metal.

Fourth. Plaintiff's watch began at midnight.

[fol. 19] Fifth. Plaintiff was confined to a hospital from February 17, 1927, to February 28th, 1927.

Sixth. The name of the hospital is the United States Marine Hospital.

Seventh. Plaintiff is still prevented and will be permanently incapacitated from continuing in his employment as seaman.

Eighth. Plaintiff has not expended moneys for medical care.

Ninth. The injury is a total and permanent blindness of the plaintiff's left eye.

Tenth. The captain and officers of the said vessel knew that Jackson, the second assistant engineer who made the assault, was a violent and dangerous man, likely to assault subordinates, particularly when the said Jackson was intoxicated; that the said officers were negligent in allowing the said Jackson to remain in authority prior to and at the time of the assault, knowing that he was in an intoxicated condition, and consequently a menace to the safety of the subordinates in the vessel.

Eleventh. The captain and officers of the vessel had actual knowledge of the matters stated in the preceding paragraph.

Twelfth. The plaintiff complained immediately to the cap-
[fol. 20] tain of the vessel; the captain and officers failed and refused to punish and discipline the said Jackson and attempted to shield and protect him from liability for the said assault by coercing and intimidating the plaintiff into signing a written statement.

Thirteenth. That the written statement referred to in the last preceding paragraph is not in the plaintiff's possession.

Fourteenth. In reply to the sixteenth, seventeenth, eighteenth and nineteenth demands, plaintiff alleges that it was the duty of the captain and officers of the vessel, knowing of the brutal assault made upon him by the said Jackson, to detain the latter and to surrender him to the proper authorities upon the arrival of the vessel at the port of destination.

Dated New York, March 20, 1928.

Thomas J. Cuff, Attorney for Plaintiff, 51 Chambers Street, New York City.

[fol. 21] *Duly sworn to by Robert Cain. Jurat omitted in printing.*

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION, MACK, C. J., DENYING MOTION FOR A NEW TRIAL—December 22, 1928

MACK, Circuit Judge:

Motion for new trial.

After very considerable hesitation I have come to the conclusion that the motion for a new trial must be denied. [fol. 23] My hesitation is due to my own doubts both as to the facts relating to the cause of the injuries, the consequence thereof as affecting the plaintiff's eye and the amount of the damages, and as to the law governing the situation.

Whatever my own views might have been had I sat as a juror, I have definitely reached the conclusion that the jury on this record could reasonably have found as they did and I am not prepared to say that so finding the damages can be deemed so excessive as to justify a reduction by the Trial Judge.

If a Trial Judge is satisfied that the verdict reached and/or the damages are based not upon the record but upon extraneous circumstances, such as undue sympathy on the one side or irritation or passion on the other; I conceive it to be his duty to set aside such a verdict or in any event

to reduce the damages. But a mere difference of opinion on his part as to the correctness of the result reached by the jury does not in my judgment justify either the granting of the motion or the reduction of the amount of the verdict.

As to the law, I am unable to follow the Gabrielson case, 135 N. Y. 1, even though it be still regarded as the law of New York (Encarnacion vs. Jamison, 230 N. Y. Supp. 16 [1928]). In one aspect it is clearly contrary to the decision in this Circuit, 67 Fed. 342, between the same parties. Furthermore, in holding that a principal is never liable [fol.24] for willful and unjustifiable assault by his agent, it is contrary to the weight of authority.

The Astral, 134 Fed. 1017, is not in point; it holds only that a libel in rem cannot be maintained because of the master's neglect to prevent a mate from brutally chastising plaintiff.

The Wawalona, 1925 A. M. C. 552, oral opinion District Court Oregon, cannot be followed if in any aspect it is contrary to the views herein expressed.

In my judgment the fellow servant rule has no applicability. It is unnecessary therefore to consider whether or not this action can be sustained under the Jones Act with its nonapplicability of the fellow servant rule.

The liability of the defendant in this case is based upon ship owners' responsibility for the acts of the second engineer in relation to a seaman, acts done, in the jury's opinion, in the course of his duty as the superior of the seaman, and as thus representing the owner and not in his personal capacity out of personal spite or malice.

The Osceola 189 U. S. 158, in my judgment does not cover and was not intended to cover the question of the liability for any and all injuries that might be sustained by a seaman, whether as against the ship or as against the owner in personam. The opinion does not purport to state the law on the entire subject matter.

[fol. 25] On the other hand, the General Rucker, 35 Fed. 152; Memphis & N. Packet Co. vs. Hill, 122 Fed. 246 (C. C. A. 8); and Wolfe vs. Thomas, 268 Fed. 164 (C. C. A. 6) support plaintiff's contentions. Davis vs. Green, 260 U. S. 349, presented a totally different situation. It was not the case of a superior officer in the course of his duty either enforcing obedience from one subject to his orders or endeav-

oring to punish him for disobedience thereof and to secure better compliance therewith.

In my judgment the statutory provision for liability of the owner if the master negligently permits the escape of an officer who has inflicted flogging or any other form of corporal punishment does not negative a liability for the direct act of such an officer when done in the apparent course of his duties and not as a matter of personal spite or malice.

Motion denied.

Julian W. Mack, U. S. C. J.

[fol. 26] In United States District Court

[Title omitted]

Order Denying Motion for a New Trial—Jan. 3, 1929

The issues in the above entitled action having been duly brought on for trial before the Honorable Julian W. Mack, Circuit Judge, and a Jury, at a Term of this Court for trial on the 30th day of July, 1928, and the Jury having [fol. 27] rendered a verdict in favor of the plaintiff and against the defendant for the sum of $12,000, and the defendant having duly moved for an order setting aside the said verdict and for a new trial, and after hearing Carver W. Wolfe, Esq., of counsel for defendant on behalf of said motion, and Thomas J. Cuff, Esq., attorney for the plaintiff, in opposition thereto, and the opinion of the Court having been filed herein;

Now, on motion of Thomas J. Cuff, Esq., attorney for the plaintiff, it is

Ordered, that defendant's motion to set aside the verdict of the Jury and for a new trial be and the same hereby is denied, with costs to the plaintiff; and it is

Further Ordered, that the defendant have thirty (30) days within which to appeal, and sixty (60) days within which to file its case and exceptions on appeal; and it is

Further Ordered, that execution on said verdict be stayed thirty (30) days from entry of judgment herein.

J. Mack, Circuit Judge.

We hereby consent to the entry of the foregoing order.
Dated New York, January 2nd, 1929.
Hatch & Wolfe, Attorneys for Defendants.

[fol. 28] In United States District Court, Southern District of New York

L 41/83

Robert Cain, Plaintiff,

against

Alpha Steamship Corporation, William H. A. Walker, and Frank Daly, Copartners, Doing Business under the Firm Name and Style of Walker & Daly, Defendants

Judgment

The issues in the above entitled action having duly come on for trial before the Hon. Julian Mack and a jury at a Stated Term of the United States District Court for the Southern District of New York, held in the Post Office Building in the Borough of Manhattan, City and State and Southern District of New York, on July 27th, 30th, 31st and August 1st, 1928, and the issues having been duly tried and the jury having duly rendered a verdict on the 1st day of August, 1928, in favor of the plaintiff and against all of the defendants for the sum of Twelve Thousand five hundred ($12,500.00) Dollars, and the defendants having moved [fol. 29] to set aside the said verdict and for a new trial, and the said motion having been denied, and the costs of the plaintiff having been duly taxed in the sum of $59.00;

Now, on motion of Thomas J. Cuff, attorney for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff, Robert Cain, recover of the defendants, Alpha Stamship Corporation, William H. A. Walker and Frank Daly, co-partners, doing business under the firm name and style of Walker & Daly, the sum of Twelve thousand five hundred ($12,500.00) Dollars, the amount awarded by the jury, together with the sum of $308.50, interest on said verdict from the date thereof, and the sum of $50.00 costs as taxed, making in all

the sum of Twelve thousand eight hundred sixty-seven and 50/100 ($12,867.50) Dollars, and that the plaintiff have execution against all the defendants therefor.

Judgment made and entered the 3rd day of January, 1929.

Alex. J. Gilchrist, Jr., Clerk.

[fol. 30] In United States District Court, Southern District of New York

Robert Cain

against

Alpha Steamship Company

Bill of Exceptions

Before Julian W. Mack, J., and a jury

July 26, 1928—2:00 p. m.

Appearances of Counsel

Thomas J. Cuff, Esq., Attorney for Plaintiff.

Messrs. Hatch & Wolfe, by Mr. C. W. Wolfe, Attorneys for the Defendant.

(It is stipulated by both sides, that the jury may be examined by counsel in the absence of the Court, by permission of the Court.)

[fol. 31] (The jury was duly empaneled and sworn.)

Plaintiff's Opening

By Mr. Cuff: May it please the Court and gentlemen of the jury: I will briefly state to you without going into detail what the plaintiff intends to prove in this case.

The steamship "Alpha" runs down to Venezuela, and was at Venezuela on February the 5th, 1927. It was there before that, but you will hear us talking about the 5th day of February, a good deal during this case, and it was there on this day, and so we come to one A. M. on the morning of

February 6th. At that hour, this plaintiff will tell you that he was struck by the second assistant engineer with a monkey wrench, in the left eye, so that he became blind in that eye. He will tell you that the second assistant engineer was drunk.

When the plaintiff was about to go on his watch, he was a little bit late, he met the second assistant engineer, who is his superior, and the "second" struck him with a monkey wrench in the left eye, so that blindness almost immediately was the result. Cain, the plaintiff, will explain to you that as fireman on the steamship "Alpha," his watch was from [fol. 32] twelve to four, each time of the day that those hours came around. On February 5th, at midnight, is the time that he started to work on his watch, the midnight watch, from twelve midnight to 4 A. M., on Feb. 6th. He will tell you that on that night he overslept, and that he did not get down to the engineroom until about twenty minutes to one. The method of entering the engineroom is by a spiral staircase, with which you are all familiar on boats, this staircase being four flights of stairs with a platform between each flight of stairs, he went down the first flight of stairs and there met the first assistant engineer, who was blocking the passage on this spiral staircase, and leaning over in this fashion (indicating) on the bannister. He was drunk. The plaintiff tapped him on the shoulder in order to have him move out of the way so that he could go on down in the engineroom, and the first assistant engineer had some words with him about being late on watch, and punched him twice in the face. The plaintiff ran up that flight of stairs again instead of going on down, ran up the one flight of stairs again to the passageway by the deck and stood there on the top, because of this attack. He looked down and saw the first assistant going down to the engineroom, and continuing to look down he saw the first and second assistant engineers in a conversation, and he saw [fol. 33] them pointing up to him on the top of the landing. Then the second assistant engineer came staggering up this stairway. When he got to the top, in substance he asked Cain why he was late. He should have been there at twelve o'clock and it was now one, or near one. Cain said that he had overslept a bit and apologized, and the second assistant, who carried a flashlight in one hand and a wrench

in the other hand responded by striking Cain on the head with the wrench, and then Cain fell back, like that (indicating) and while he was in that position he hit him another blow with this wrench, this time right in the left eye or over or below the eye. After that, Cain fell down, with blood coming from his head and face.

He staggered out of this little place he was in, and the second assistant engineer, carrying the same weapons, followed him around the stern of the vessel, this happened on the port side, with Cain running all the way around the stern of the vessel and up to the starboard side and the second assistant engineer staggered along in his drunken way after him, up the starboard side of the vessel where Cain looking back to see whether the second assistant engineer was following him, tripped over a steam casing that ran fore and aft or crossways at least, across the ship, tripped over that and fell on his arm, not on his head or on [fol. 34] the eye, and then got up and staggered in to the captain.

That is all that I am going to give you in detail, except to say that in passing around the starboard side of the vessel, Cain and the second assistant passed another seaman who happened to be there that night, and who will be here and testify. Jackson, the second assistant engineer, while pursuing Cain, was calling him names and threatening him for coming on watch late.

That is all for the present, gentlemen. I thank you.

Defendant's Opening

By Mr. Wolfe: May it please the Court, gentlemen of the jury: I shall be as brief as my friend here was. The defense in this case, is twofold. First, we deny that any assault was ever committed, and secondly, we allege that Cain hurt his head and eye when he was staggering along the deck. He tripped over the obstruction and he hit his head.

As you all know, watches at sea are divided into four-hour watches. Four hours on and eight hours off. On the day of February 5th, we will show you that this plaintiff, [fol. 35] Cain, was ashore in the town of Emorn, Venezuela, where the ship was then lying. The chief engineer,

who is now dead, was ashore in a cafe, or along the beach, I have forgotten which, in company with the third engineer who will be here to testify. On the night of the 5th, Cain, the plaintiff, assaulted the chief engineer as he was lying on the beach. He then came aboard after some period of time and he went to bed, and he was drunk when he came aboard.

Being on the twelve-to-four watch, and not having shown up at the twelve o'clock shift, down in the engineroom where he belonged, the first assistant engineer went up on deck to find him, because the second had to stay down there where he belonged, down in the engineroom. It was there that Cain met the first assistant.

The defendant's version of what took place there is that Cain hit the first assistant, and knocked his glasses off, and then Pankor, that is the first assistant's name, the first assistant went down to the engineroom, and Jackson came up. Jackson is the second engineer's name. As Jackson came up, he saw this plaintiff sticking his head into the doorway that leads into the engineroom stairway, and as Jackson came up Cain started to run back on the ship, and Jackson followed him. While Cain was running back on the ship he tripped over this steam casing and fell [fol. 36] and that is how he was hurt. We claim, in any event, that if there was such an assault, and if Jackson was drunk, which it is claimed here, it is claimed that the defendant is not liable.

Gentlemen, I thank you.

ROBERT CAIN, being duly called and examined in his own behalf, was sworn and testified as follows:

Direct examination.

By Mr. Cuff:

Q. Mr. Cain, I want you to speak loudly and slowly so that the jury can hear you.

A. Yes, sir, I will try to.

Q. Where do you live?

A. 44 Hyslop Street, Liverpool, England.

Q. How old are you?
A. Forty-four.
Q. Are you married?
A. Yes, sir.
Q. How many children?

Mr. Wolfe: I object to the question as to how many children he has.
The Court: The objection is sustained.

Q. How many children have you got?

The Court: That has been objected to and I have sustained the objection.
Mr. Cuff: Exception.

[fol. 37] Q. And is your home at Liverpool?
A. Yes, sir.
Q. Is that where your family lives?
A. Yes, sir.
Q. At the time of this accident, the time of this injury, were you supporting your family?

Mr. Wolfe: I object to that.
The Court: The objection is sustained.
Mr. Cuff: Exception.

Q. How long have you been a seaman?
A. Twenty years, all told.
Q. Twenty years all told?
A. Yes, sir.
Q. What was your position on February 6, 1927?
A. Fireman.
Q. And as fireman, what was your wages?
A. 62.50.
Q. Did you say $62.50.
A. Yes, sir.
Q. Is that a month?
A. Yes, sir, $62.50 a month.
Q. Did that include your board and lodging on the boat?
A. Yes, sir.
Q. I mean, that you had board and lodging on the boat without paying for it, is that right?
A. Yes, sir.
Q. Now, when you are off the boat, how much do you have to pay for board and lodging per week, about?

Mr. Wolfe: I object to that as not being pleaded in the bill of particulars.

The Court: Is the bill of particulars attached here?

Mr. Cuff: Your Honor please, I am not showing it for [fol. 38] loss of money. We are showing it for loss of earning power.

Mr. Wolfe: You have not pleaded a loss of earning power.

Mr. Cuff. Paragraph 9 of the complaint refers as follows: "That plaintiff has been and will be permanently prevented from attending to his usual duties and occupation." That is the ninth folio, paragraph nine.

The Court: He may show under the ninth allegation, unless there is something asked for in the bill of particulars. He may show he got his board and lodging with $62.50, all together, making up his total wages and by reason of this he was then out of employment and he had to spend so and so much to live.

Mr. Wolfe: He has not pleaded that he has lost any wages. There is no such allegation anywhere that I can find.

The Court: It reads: "He has been and will be permanently prevented from attending to his usual duties and occupation". I think that is sufficient. The objection is overruled.

Mr. Wolfe: Exception.

A. Will you repeat the question again?

Q. (Question repeated.)

A. About $12.

Q. Is that a week?

A. Yes, sir.

Q. $12 a week?

A. Yes, sir, about that.

Q. About $12 a week.

A. Yes, sir.

Q. Please speak up loud now, Mr. Cain, and speak [fol. 39] slowly.

A. Yes, sir.

Q. Before February 6, 1927, did you ever have any trouble with either of your eyes?

A. No, sir.

Q. And could you see without using glasses?

A. Yes, sir.

Q. With each eye?

A. Yes, sir.

Q. How may voyages, before the voyage that brought you to Venezuela on February 6, 1927, how many voyages previous to that did you make on the "Alpha"?

A. Two or three all told.

Q. Now getting down to February 5th, the day of the night when you were injured. On February 5th, did you do your first watch beginning at midnight on February 4th?

A. Yes, sir.

Q. And that lasted until four in the morning?

A. I was on until eight.

Q. Never mind that; your watch lasted until four?

A. Yes, sir.

Q. And at four in the morning did you go off duty.

A. No.

Q. Why didn't you go off duty at four, the end of your watch?

A. I did the watch for the fireman ashore.

Q. The other fireman was ashore?

A. Yes, sir.

Q. How long did you stay on duty?

A. Until eight o'clock.

Q. In the morning?

A. Yes, sir.

Q. After eight in the morning of February 5th, tell the jury what you did then.

A. I went and got my breakfast and I came off about [fol. 40] eight o'clock, when I came off about eight o'clock I got my breakfast. I washed up and went ashore about ten o'clock. I had walked along the beach and was going along the beach when I met the first officer, the chief engineer, the second assistant, and the third officer and a fireman, and they were riding on donkeys, and they were all drunk.

Mr. Wolfe: I move to strike out the answer; he was asked what he did.

The Court: It simply saves another question.

A. (Continuing:) The chief engineer had no coat on, his shirt was all torn.

The Court: Who:

The Witness: The chief engineer.

The Court: The chief engineer had no coat on?

The Witness: Yes. The second assistant had no coat on and the third officer had a coat on but it was all mussed up.

Mr. Wolfe: If your Honor please, the last trial took exactly five days because of these kind of answers.

The Court: Well, this case I hope, will not take five days. Strike out that part of the answer.

Mr. Cuff: How much is the Court striking out?

The Court: All that had to do with the coats.

[fol. 41] Q. Now did you see any officers of the boat on the beach, or the street, on February 5th?

A. Yes, sir.

Q. State who those officers were, and any members of the crew, and state also their condition.

A. The chief engineer, the second engineer, the third officer and the fireman.

The Court: And their condition?

The Witness: They were drunk.

The Court: All of them?

The Witness: Yes.

Q. Were they riding on anything?

The Court: He has said long ago that they were riding on donkeys.

The Witness: Yes.

The Court: On donkeys?

The Witness: Yes, sir.

Q. Did you have any conversation with the fireman at that time?

A. I did.

Q. What was the conversation?

Mr. Wolfe: I object to any conversation about the fireman.

The Court: Objection——

Mr. Cuff: I will withdraw the question.

Q. Will you state to the jury what the condition of the fireman was?

The Court: He said they were all drunk.

The Witness: That is right.

[fol. 42] Q. I mean what was their condition in addition to that?

The Court: All right, you may answer that.

A. They were singing and shouting, and the fireman said to me, "Will you keep my watch for me," and I said yes. He said, "Take your time going aboard."

The Court: What has all this got to do with this case, what the fireman said?

Mr. Cuff: I didn't ask him that.

Q. Don't say what the fireman said. I ask you what the condition of the fireman was.

The Court: He said singing and shouting.

Q. What else about the fireman as to his condition, what about his face?

A. He had two black eyes.

The Court: What has that got to do with this case? The fireman's black eyes. Are we trying the fireman's black eyes?

Mr. Cuff: Cause of action because of acquiescence.

The Court: Asquiescence in what?

Mr. Cuff: In these assaults.

The Court: What has that got to do with the fireman?

Mr. Cuff: He was with the men that inflicted the assault [fol. 43] upon him at that time. The man that assaulted Cain was with the fireman, and the fireman had been in a fight.

The Court: But we are not trying the fireman's fight or his black eyes. Let us keep down to the facts in this case. I shall have to interrupt a great deal, counsel, in this case, and it is always a hardship upon counsel for the Court to interrupt, it is harmful, but unless you stick right to this case I will be forced to interrupt you.

Mr. Cuff: Your Honor, I did not mean——

The Court: Let us get ahead. Do not let us argue.

Q. After you saw these men on the beach, Cain, what did you do?

A. I took a walk.

Q. And what time did you return to the boat?

A. About half past four.
Q. And when you returned to the boat, what did you do?
A. I had my supper and I stayed down for a while.
Q. And what did you do then?
A. And then I went to bed.
Q. And what time would you say it was when you went to bed?
A. A little after six.
Q. And did you go to sleep?
A. Yes, sir.
Q. What next did you do?
A. I was called about half past eleven the next thing that I remember.

The Court: When were you called?
[fol. 44] The Witness: About eleven-thirty.

Q. Eleven-thirty that night you were called?
A. Yes.
Q. Did you get up?
A. Not right away.
Q. And what next did you do?
A. I called and I said to the fellow, "All right."

The Court: What next did you do?
The Witness: I laid back and fell asleep again, I took a little sleep.

Q. Don't repeat. What next did you do after you didn't get up the first time, when were you called?
A. I got up.

The Court: What time?
The Witness: About twenty past twelve.

Q. About twenty minutes past twelve?
A. Yes, sir.
Q. Tell us what you did from then on. Speak loudly and distinctly.
A. I got up about twenty minutes past twelve. I changed my clothes and I went along the deck to the salon and I had a drink of coffee. I looked at the clock and I saw that it was sometime about twenty minutes to one. I started down in the engineroom and——

The Court: You mean all the way down?

The Witness: No, toward there. I got to the second grading.

[fol. 45] The Court: You mean down one flight?

The Witness: I met the first assistant. He said, "What time is this to come down on watch"?

Mr. Wolfe: I object to this line of questioning as to what the first assistant said to him; what has the first assistant to do with it? He is suing for an assault allegedly committed by the second.

The Court: The objection is overruled.

Mr. Wolfe: Exception.

A. I met the first assistant. And he said, "What time is this to come down"? I said, "I am sorry, I am afraid I am a bit late." He struck me on the face. I asked him what was that for, and he hit me again. I asked him again what was that for. I got him around the body to save myself, and the two of us fell on the ladder. He said, "Mind my glasses."

The Court: Who said?

The Witness: The first assistant.

The Court: Said, "Mind my glasses"?

The Witness: Yes.

The Court: Go ahead.

A. I went up the ladder, after freeing myself and I got up on the top grating and I looked down to see if he was following me. I seen that he was not following me and I went out on deck. I came back again and I seen him talking to the second assistant.

The Court: Where?

[fol. 46] The Witness: Down at the bottom.

The Court: Four flights down?

The Witness: Three flights from where I came out.

The Court: Four from where you were standing?

The Witness: Yes, sir.

Q. And then what did you do?

A. He pointed up toward me, and then the next thing I seen the second assistant coming up. He came all the way up and spoke to me and he said, "What to do with you."

Q. That mean, "What is the matter," is that right?

A. I don't know what is the matter with him, I wanted to know what is the matter with the first engineer, the first assistant. That is what I said to him, I said to him, "I don't know what is the matter with me, what is the matter with the first assistant"? He told me I was a bit late. I says to him, "Yes, I am a bit late, I overslept," and he said, "Late be damned," and he says to me, and he struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him. I got over to the starboard side of the boat, running around the stern, I got over to the starboard side, and on the starboard side, I met the steward. He said, "What is the matter, Charlie?" I kept [fol. 47] running on and looking back to see if the second assistant was following me. When I was running along and looking back to see if he was following me I tripped over a steam casing. I picked myself up again and I started to run to the captain's room. I got into the captain's room and I said to the captain, "The second assistant engineer has struck me with a monkey wrench." The captain took me down to the salon and got me down there and he dressed me, and while we were in there and he dressed me, the first and second assistants came in.

Mr. Wolfe: I object to what the captain did.

Mr. Cuff: That plaintiff has charged the second assistant engineer with committing an assault, and we have a cause of action for failure to report the assault by the captain, in the log, according to statute.

The Court: Is that going to be a cause of action?

Mr. Cuff: Yes.

The Court: All right, the objection is overruled.

Mr. Wolfe: Exception.

Q. Go ahead.

A. Well, when I was in there being dressed by the captain, the first and second assistants came in, and I pointed to the second assistant and I told the captain, "There is the man that done that," pointing to the second assistant. The captain chased the first and second assistants right out of [fol. 48] the salon; he chased them both out of the salon.

Then he dressed me up, and chased me forward. He dressed my head and my eye and sent me forward with two men to help me.

Q. And you went into your bunk, did you?

A. Yes, sir.

Q. Now when you saw the first assistant on the stairs, when you first went down toward the engineroom, will you describe the way he was standing? Stand up yourself and show us how he was standing.

Mr. Wolfe: I object to anything that the first assistant did, as being immaterial.

The Court: I don't see how it is material.

Mr. Cuff: I will withdraw the question.

Q. Will you state whether the first assistant whom you met on the stairs, was sober or drunk, or what was his condition?

A. He was drunk.

Q. Now will you indicate to the jury the manner in which the second assistant came up the stairway, the spiral staircase?

A. He had a monkey wrench in his left hand and a flashlight in his right hand, and he came up in that fashion (indicating), staggering from one side to the other.

Q. Indicating that he was swaying from side to side; is that what you are trying to do?

A. Yes, sir, he was swaying from side to side, with a [fol. 49] monkey wrench in his left hand and a flashlight in his right.

Q. When you stated that he had a monkey wrench in his left hand you indicated with your right hand. Which do you mean to say?

A. In the left hand he had the monkey wrench and the flashlight was in his right hand.

Q. Now when he got to the top, where were you? You were standing on the grating, were you?

A. Yes, sir.

Q. Right over the staircase?

A. Yes.

Q. Will you state to the jury what was the condition of the second assistant engineer, was he drunk or sober?

A. He was drunk.

Q. After you ran around from the starboard, I mean from the port side to the starboard side of the boat, in going around from the port side where you were struck, you went around the stern of the vessel, with the second assistant following you?

A. Yes, sir, he was following me.

Q. And was he running as fast as he could?

A. Yes, sir.

Q. And did he have these things in his hands still?

A. Yes, sir, he did.

Q. And was he saying anything?

A. Yes, sir, he said to me, "I will teach you to go down on your watch, you bastard."

Q. And as he followed you around the deck of the vessel, did he continue to call you names?

A. Yes, sir, he did.

Q. Well, after you got into the captain's room,—I withdraw that. As you ran up the starboard side of the vessel, was there any blood anywhere on you?

[fol. 50] A. Yes sir, there was blood all over my shirt and trousers and my arms, coming out of my head.

Q. Where was the blood coming from?

A. Coming from my head and eye.

Q. But when you got into the captain's room what did he do, follow you?

A. Who?

Q. Well, never mind. When you got into the captain's room, what did the captain do for you?

A. Well, he washed me and dressed up the wounds and put some stuff on them.

Q. What happened to you while you were with the captain in the salon?

A. I fainted.

Q. What kind of a boat was this, Mr. Cain?

A. It was an oil tanker.

Q. Now as you ran up the starboard side you say you tripped over some casing?

A. Yes, sir, I did.

Q. At that time what part of your body was struck, if anything?

A. My legs, and my arm; my legs tripped over the casing and I went over.

Q. Did you strike your eye?

A. No sir, I landed on my arms, to save myself, I landed on my arms, I put my arms out when I found myself falling.

Q. Did you land on your head?

A. No, sir, I did not, I only landed on my arms and legs.

Q. Well, how far, in feet, was it from the point where Jackson hit you to the point where you tripped over the steam casing?

A. It was away around from the engineroom. From one side of the engineroom to the other side of the engineroom. Half way around the stern.

The Court: About how many feet?

[fol. 51] The Witness: I can't say in feet because it is curved.

Q. Now, have you told—I withdraw that question. Now, this injury was received by you at one A. M., on the 6th day of February, wasn't it?

A. Yes, sir.

Q. Later in the morning on that same day—

A. Yes.

Q. Did anybody do anything for your eye?

A. Well, only the captain dressed me.

Q. Well, after the captain, later on in the morning, I mean.

A. Yes, sir, the chief steward dressed my eye.

Q. About what time was that?

A. That was about ten o'clock in the morning.

Q. What did he do?

A. He took the old bandage off and washed my face for me and then he put some stuff on my eye and dressed it up again.

Q. How often did you go to the steward for that treatment, the chief steward?

A. From then until we returned to New York.

Q. Do you know what date you arrived in New York?

A. About the 16th.

Q. On the first morning, when the steward took the bandage off, will you tell the jury was there any blood on that bandage?

A. Yes, sir, there was.

Q. Now on the second morning, when the steward took the bandage off, did you try to see with your left eye?

A. Yes, sir, I did.

Q. That was on the second morning?

A. Yes, sir.

[fol. 52] Q. Now, did you do that on the third morning, also?

A. Yes, sir.

Q. And on the fourth morning?

A. Yes, sir.

Q. Now tell the jury will you please, what experience you had, and what you did with respect to trying to see with your left eye when the bandage was off.

A. When the steward took the bandage off my eye, I held my hand to my right eye and I tried to see out of my left eye, and all that I could see it just seemed to be a blur. I told the steward, that everything was a blur, and the steward put some stuff in my eye. He said, "That may help." I said, "I can hardly see at all with this eye." I went forward the next morning and when I came again and got dressed, when he took the bandage off, and when I put my hand over my eye I could not see anything, everything was black.

The Court: Do you see the black now?

The Witness: It is black now.

Q. Ever since that time?

A. Yes, sir.

The Court: Can't see at all out of the left eye?

The Witness: No, sir.

Q. After you came to New York what did you do with respect to having treatment for your eye?

A. I went to the chief engineer, and he told me, he said, "Wait for me." The day before we got to New York, the chief engineer said, "I will take you to a hospital." He said, "I will take you to a hospital just as soon as we get [fol. 53] into port." When we came to New York, and were in port, I went to the chief and I said, "Are you going to take me to the hospital?" He said, "Yes." He said, "Just wait a minute." I waited and waited, and then I

went to him again and I asked him if he was going to take me to the hospital and he said, "Well, I am rather busy." I said, "All right." Then I went to him in the afternoon. He said at that time, "Wait until morning," and he dressed me. The next morning I went to him and I said, "Chief, are you going to take me to the hospital," and he said, "Come with me to my room," and he took me to his room and he dressed my eye up again. He said at that time to me, "You will have to get a note from the captain, or the third officer." I went to the captain's room and he was not aboard. I asked the third officer and he wrote a note out for me. I went to the Staten Island Hospital and told them where I got the accident. The doctor there took me into a little room and he took the plaster off and the bandages off and he looked at it and he said to me, "Who dressed this eye?" and I said, "The chief steward." And he said, "Well, he made a mighty good job of it." And after looking at the eye in this little room, then they put me in the hospital.

Q. And how long did he keep you in the hospital?

A. 26th I came out.

Q. That would be about ten days?

A. Yes, sir.

Q. Now after that. After you came out of the hospital, [fol. 54] how long was it before you did any work?

A. About six months.

The Court: How long before you tried to get work?

The Witness: I tried every day.

The Court: From the time you left the hospital?

The Witness: Not exactly, about a week after. I was tending an office where the Walker & Daly people sent me to.

Q. Did you get any pay for that period, that six months?

A. Yes, sir, they gave me three, twenty dollars.

Q. I mean, did you have a job?

A. No, I had no job.

The Court: Who gave you the twenty dollars?

The Witness: Walker Daly.

The Court: For how long?

The Witness: They gave me three, twenty dollars.

The Court: During the six months they gave you three times, twenty dollars, or sixty dollars?

The Witness: Sixty dollars, no, one time it was $50.
The Court: What did you get now? Give me that again.
The Witness: I got three, twenty dollars, and fifty dollars.
The Court: That makes $110 altogether.
[fol. 55] The Witness: Yes; they were waiting for the ship to come back.
The Court: What ship?
The Witness: The "Alpha".
The Court: This same ship you were on?
The Witness: Yes, sir, to get information from the captain and crew.
The Court: Who told you to wait?
The Witness: The Walker Daly people.
The Court: They told you to wait for that ship?
The Witness: Yes, until they could get all the witnesses.
The Court: Why didn't you work in the meantime?
The Witness: I couldn't get a job.
The Court: Why?
The Witness: I had no money to buy any job.
The Court: Does it take money to buy jobs?
The Witness: Yes, sir; sometimes eight dollars and sometimes six dollars, it all depends.

Q. Now, Mr. Cain, are you out of work now?
A. Yes, sir.
Q. Where are you living?
A. 25 South Street.

The Court: At the end of six months did you go to work?
The Witness: Yes, sir.
[fol. 56] The Court: Where?
The Witness: In the Sailors' Institute, as watchman.
The Court: When did the "Alpha" come back?
The Witness: The "Alpha" came back—but when she did come back the second assistant was not on the "Alpha" then; he was down in Philadelphia and we had to wait for sometime later. He was in Philadelphia somewhere.
The Court: When did you get this job in the Sailors' Institute?
The Witness: Six months after.
The Court: How much did it pay you?
The Witness: $24 a week.

The Court: And board and lodging?
The Witness: No, sir.

By the Court:

Q. How long did you hold that job?
A. Until four weeks ago.
Q. Why did you lose that?
A. They gave me a bigger job and I could not handle it.
Q. At the same place?
A. Yes, sir, I could not do it.
Q. Did they put you out or did you get out?
A. I had to quit; I could not do the job.
Q. Have you tried to get work since?
A. Yes, sir.
Q. Why haven't you gotten something?
A. I worked four hours the other day, and I got 50 cents [fol. 57] an hour, I made two dollars.
Q. Is that all you got in the last four weeks?
A. That is all, sir.
Q. That is all you got?
A. Yes, sir.

By Mr. Cuff:

Q. Now, Mr. Cain, do you know any other trade other than fireman?
A. Only fireman and coal passer, and donkey-man.
Q. How many years did you do that kind of work before the accident?
A. About twenty years.
Q. And during that twenty years, can you state to the jury about how much time you were out of work?
A. I can't say, I was out of work about a week in between each voyage. You can easily tell by this book here (witness producing and exhibiting black book), sometimes nine days it was.
Q. Did you try to get a job as fireman, since you had this injury?
A. No, sir.
Q. Why didn't you?
A. I knew that I could not do it.

Mr. Wolfe: I move to strike out the answer.
The Court: Motion denied.

Mr. Wolfe: Exception.
Mr. Cuff: That is all.

[fol. 58] Cross-examination.

By Mr. Wolfe:

Q. You stated that on the morning of the 5th, Mr. Cain, you worked from twelve midnight, that is twelve midnight the night before until eight, or from four the night before until twelve.

A. At midnight until four, that is my watch, but I stayed on until eight on account of the fireman being ashore.

Q. That is on the 5th?

A. Yes, sir.

Q. Now did you work on the afternoon of the 5th, on the four to eight watch?

A. No, sir.

Q. And do you recall testifying at the last trial of this action?

A. I beg your pardon?

Q. I say do you recall testifying at the last trial of this action, "I told him"——

The Court: Do you remember that you testified the last time to this case?

The Witness: I don't remember.

The Court: No, no, were you on the stand, do you remember?

The Witness: Yes, sir.

Q. Do you remember that I asked you at that time the question, "Did you work from four to eight in the afternoon on the 5th". Do you recall that question?

A. I worked from twelve to four. I did not work from twelve to eight.

Mr. Wolfe: Will you please instruct the witness, your Honor, to answer the question?

[fol. 59] The Court: Do you remember his asking you that at the last trial?

The Witness: I said eight to four.

Q. Do you remember that question on the last trial?

A. I told you what I done, from twelve to four.

The Court: No, he asked you whether you remember the question, whether you worked from four to eight.

The Witness: I told him that I did not, I told him that I worked from 12 to 4. That is all I could say. How could I say anything else?

The Court: Wait a minute. All that he asked you was did you work from four to twelve. Did he ask you that?

The Witness: Four to twelve, no.

The Court: Do you remember that question being asked?

The Witness: No.

Q. And your answer is that you don't remember being asked that question, is that it?

A. I told you that I was on from the twelve to four, I can't say anything else.

The Court: Listen, listen——

The Witness (interrupting): I can't say anything else, that is what I did say.

The Court: Just listen to the question that is put to you, and just answer that question; please do not make any speeches.

[fol. 60] Q. Now, is the answer that you don't recall the question?

A. I don't know what you mean.

The Court: Do you remember his asking you that question?

The Witness: I remember him asking me what watch I was on.

The Court: Do you remember him asking you, "Did you work that afternoon from four to eight, the afternoon of the 5th," do you remember that?

The Witness: Not from four to eight.

The Court: Do you remember whether he asked you that?

The Witness: No, sir.

Q. Do you recall the question at the last trial, "Did you work on the afternoon of the 5th from twelve to four?"

A. No, I never worked from——

The Court: Listen, Mr. Witness, all that he wants to know now is whether you remember at the last trial of him ask-

ing you the question, did you work from twelve to four on the 5th. Do you remember that?

The Witness: Yes, and I told him no.

The Court: Not that. Nobody has asked you what you told him.

The Witness: Yes, I told him no.

Q. Do you recall having said in answer to a question, [fol. 61] "Yes, I did work." Do you recall that?

A. I think we are mixed up in the dates.

Q. Do you remember saying, "Yes, I worked——"

The Court: What was the question?

Q. Do you recall the following question: "And you worked from twelve to four on the afternoon," and your answer was, "Yes, sir"; do you recall that?

A. I remember telling you about twelve o'clock——

The Court: Do you remember this, that you answered that way, or didn't you?

The Witness: I remember something.

The Court: Do you remember this?

The Witness: Yes.

The Court: And did you answer yes?

The Witness: I told him something——

The Court: What was that?

The Witness: I said no.

The Court: No, all right, you didn't answer. All right, go ahead.

Mr. Wolfe: Do you, Mr. Cuff, stipulate that this is an accurate transcript of the last trial?

Mr. Cuff: Yes.

Q. Do you recall, following the question which was asked you on the last trial. "Now, were you ashore on the day of the 5th at all," and the following answer, "No, sir." Do [fol. 62] you recall that?

A. I remember the question, yes, sir.

The Court: Do you remember?

The Witness: I don't remember saying, no.

Q. In other words, you said yes that you were ashore, is that it?

A. Yes, sir.

Q. Then you deny in the last trial you said you were not ashore?

A. I said I was ashore from ten o'clock. I can't say nothing else. We went ashore after breakfast.

Q. You have been sailing in English ships, haven't you?

A. Yes, sir.

Q. What was the last English ship you were on?

A. The "Betty Holmes."

Q. And you signed on there for three years, didn't you?

A. Yes, sir.

Q. Did you serve the three years out?

A. No.

Q. Do you know whether you were lodged for desertion from that vessel or not?

Mr. Cuff: I object to that.

The Court: The objection is sustained.

Mr. Wolfe: I am attacking the credibility of the witness.

The Court: How? Where do you get that from?

Mr. Wolfe: He deserted from this ship.

The Court: What has that got to do with the credibility of a witness?

Just explain the rule of law under which you are pleading. [fol. 63] Is it conviction of a crime?

Mr. Wolfe: No.

The Court: Then what is it?

Mr. Wolfe: I am entitled to ask this witness—I am sorry, your Honor, you are quite right.

Q. Now, did you at the time you were ashore in the port of Emorn, on the afternoon of February 5th, have any conversation with either the engineer, well, I will say with the third engineer, Mr. Woodbury?

A. No, sir.

Q. Or with the chief engineer, Mr. Miller?

A. No, sir.

Q. Didn't see them at all?

A. I saw the third engineer, but I did not see Mr. Miller until I came back to the ship.

Q. Did you see the first assistant, Mr. Miller?

A. No, I did not see the first assistant until I came back to the ship, until I went on watch.

Q. I am talking about the afternoon when you were ashore.

A. I told you I never seen them.

Q. Did you see the second assistant in the afternoon?

A. No, sir, not until I went on watch.

Q. I perhaps misunderstood you, but I thought you told your own counsel that you saw the chief engineer and the third mate and the fireman drunk on the shore and riding donkeys.

A. That was when I was going ashore.

The Court: You mean in the morning at ten o'clock?

The Witness: Yes, sir.

Q. That was the morning around ten-thirty, is that it?

[fol. 64] A. That's right.

Q. Where was that?

A. On the beach.

Q. Where on the beach?

A. As you go along the beach it is all sand, down in Venezuela.

Q. Was it near the ship?

A. From the ship. You go right down the gangway——.

Q. Was the ship at a dock?

A. Yes, sir.

Q. How far out in the water does this dock project?

A. You have to go along the gangway right from the ship, and right along the gangway right into the beach. I should say perhaps it is two or three hundred feet.

Q. Well, was Mr. Miller and the other officers a hundred feet from the ship or two hundred feet or five hundred feet, along the beach?

A. They were down the beach. That is the distance of the gangway that I said, the distance from the gangway to the ship, that is from the beach to the ship along the gangway.

Q. Were they in a saloon?

A. I didn't see them.

Q. When you saw them, were they in a saloon?

A. No, sir.

Q. Did you go in any saloon when you were ashore?

A. Not to my knowledge.

The Court: What?
The Witness: No.

Q. Do you drink?
A. Yes.
Q. Do you drink whiskey?
A. No, sir.
Q. Never had a drink of whiskey?
A. Only when I got married, that is the only time I drank whiskey.
Q. Have you ever been drunk?
A. No, not drunk.
[fol. 65] Q. Never been drunk?
A. No.
Q. Do you recall being asked that question on the last trial?
A. What?

The Court: He asked you if you recall being asked that last question on the last trial?
The Witness: Yes.

Q. You do recall saying yes, that you were drunk?
A. Yes.
Q. You just told me now that you never did get drunk.
A. Well, the only time I got drunk was when I got married, didn't I say that to you? I said just when I got married.
Q. You were drunk when you got married and have not been drunk since, is that it?
A. No, sir.
Q. Do you know the chief engineer Walter Holmes on the "Hesiome"?
A. Yes, sir, I do and he is a gentleman.
Q. Were you ever on the steamship "Halsius"?
A. No, sir.
Q. Never were?
A. That is not in my discharge book, and every ship that I was ever on, that I ever worked on, is in this book. Do you want to see the book?
Q. I am not interested in that.
A. Well, do you want to look at it, and see for yourself?
Q. Let us go back to being on shore. Were you on shore on the night of the 5th, around eight or nine or ten o'clock?

A. No, sir.
Q. You were asleep in your bunk?
A. Yes, sir.
[fol. 66] Q. You are positive of that?
A. Yes.
Q. You were called out at eleven-thirty, were you?
A. Yes, sir.
Q. And you slept until twelve-twenty, is that right?
A. Yes, sir.
Q. And then you went down in the salon to get some coffee?
A. Yes, sir.
Q. What time was that?
A. Twenty minutes to one.
Q. I don't want about.
A. I said twenty minutes to one.
Q. Are you sure of that?
A. Not to the minute.
Q. Do you recall testifying at the last trial that you looked at the clock——
A. Yes, sir, I could look at my watch now and say twenty minutes to something or other, but it may be a little over.
Q. Do you recall that you were asked when you looked at that clock in the last trial, you were asked what the time was, and you said that it was twelve minutes to one?
A. Oh, no, oh, no, I never said that.

Mr. Cuff: I object to this form of question. And I ask that these questions, that he is quoting from the old trial be read from the record.
The Court: Indicate the record.

Q. Do you recall this question on page 19 of the record, "I went to the salon and I was going to get a drink of coffee, before I went down. I happened to look at the clock and it was twelve minutes to one."
A. I said twenty minutes right now.
[fol. 67] Q. Well, you went on deck and then to the entrance to the engineroom, is that correct?
A. Right.
Q. What lights were there in the entrance to the engineroom?
A. Lights?
Q. Yes, lights.

A. One outside and one inside, and the engineroom was all lit up. The engineroom is all lit up, lights here, there and all over.

Q. I am talking about the light at the entrance of the engineroom.

A. One was at the door, and one outside.

Q. One inside and one outside, is that what you mean?

A. On the casing.

Q. Was the inside companionway, that goes down to the engineroom, that has one light, hasn't it?

A. One at the center and one at the other door. There are two doors, the starboard door and the port door.

Q. There are two lights, is that right?

A. Yes, sir.

Q. And when you arrived at the companionway, that is the entrance leading to the stairs going down to the engineroom, did you see anyone?

A. Yes, sir.

Q. Who did you see?

A. The first assistant.

Q. And you walked down one flight, is that right?

A. To the second grating.

Q. And you state that he was at that time intoxicated?

A. Yes, sir.

Q. How close was he to you?

A. Well, I put my hand on his back to get him to move over.

[fol. 68] Q. Was he facing in the same direction you were, or was he facing you?

A. No, sir, his back was to me.

Q. And you were going down the stairs and he was going down the stairs, too, is that right, in front?

A. No, he was leaning over the hand rail.

Q. What step was he on?

A. He was on the top grating. He was on the long step. He was on the second grating, I mean. The second grating, the flight of stairs and a grating, and then another flight of stairs and another grating. He was on the second grating.

The Court: He was standing at the grating at the end of the first flight of stairs, one flight down?

The Witness: Yes, sir.

Q. He was on the grating, there is no doubt of that, is there?

A. No.

Q. Is there a railing around that grating?

A. A hand rail, yes, sir, on both sides.

Q. How high is that hand rail from the grating?

A. Well, three or four feet, I should say.

Q. Well, how tall are you?

A. About five foot one.

Q. And that grating comes to about your shoulders?

A. No, sir, not exactly to my shoulders. It was about this high (the witness standing and indicatnig a height about even with his waist). I know about how high they are because I used to work on them and clean them.

[fol. 69] Q. You say if I understand you correctly, that the first assistant engineer was leaning over on that grating.

A. No, on the hand rail.

Q. And you went over and touched him on the shoulder?

A. Yes.

Q. Was he in your way?

A. Sure, I could not get down the ladder.

Q. Well, how large is the grating?

A. Well, two could not get down at once. I don't know the depth. I did not take a manifest of the ship.

Q. Then as I understand your story, you started down, and he said to you without any warning at all, he said to you, "What is the idea of coming down here late", or words, to that effect?

A. Yes.

Q. And you said, "I am sorry, sir, I am a bit late"?

A. Yes.

Q. And he turned around and hit you, did he?

A. Yes, sir.

Q. Which hand did he hit you with?

A. With his left hand.

Q. Do you know whether Mr. Pankor is left-handed or not?

A. I seen it the last time that he showed it.

The Court: He asked you whether you knew if Mr. Pankor, the first assistant was lefthanded or not.

The Witness: I don't know.

Q. In any event, you are sure that he hit you with his left hand?

A. Yes, sir, and then he hit me with his right hand after.

Q. Where?

A. In the face.

[fol. 70] Q. Was his fist doubled up?

A. That I can't say. I felt the clout.

Q. Had anything occurred between you and Mr. Pankor to justify an attack of this kind in your opinion?

A. No, sir.

Q. Did you ever have any trouble with him?

A. No, sir.

Q. Had you ever worked on the same watch with him?

A. No, sir, I had not. Oh, yes, I did, but only when I was working on day work, when I first went on the ship.

Q. Well, after you were hit the first time, what did you do?

A. I asked him what it was for, and I stood back.

Q. And which way did you back, toward the stairs and went up, or the stairs going down?

A. On the grating. The grating does right along, right across the ship.

Q. And without saying anything else he turned around and hit you?

A. He said something about coming down late. I asked him what was it for. I do not think that he would have hit me if he was not drunk.

Q. What did you do when he hit you the second time?

A. I fell on the ladder, the ladder going up to the deck.

Q. And he lost his glasses?

A. No, he said, "Mind my glasses".

Q. But the glasses came off?

A. That I can't say.

Q. Was it took dark for you to see?

A. No, it was not too dark for me to see; all that I know was that he said, "Mind my glasses".

Q. Was Mr. Pankor too drunk to stand up?

A. Do you mean the first assistant?

[fol. 71] Q. Yes.

A. He was capable of looking after himself, I suppose.

Q. What did you say to him if anything?

A. I had no time to say anything. I got out of his road.

Q. What did you grab him around the waist for?

A. To save myself.

Q. And then you turned around and went up the ladder to the deck?

A. Yes, sir.

Q. And when you got on deck how long did you remain there?

A. Until the second assistant came up. I was on top of the grating and when he was coming——

Q. Was that at this time?

A. I was on top of the grating.

Q. Well, did you go outside on deck at all?

A. Yes, I told you that.

Q. How long did you stay out on the deck?

A. I can't say how many minutes.

Q. Well, what did you do on the deck?

A. Nothing.

Q. Well, what did you intend to do, return to the engine-room?

A. I intended to go down on watch.

Q. Did you stand there at the top of the grating to the stairs to the eingineroom?

A. Yes, sir.

Q. Well, how did he walk up?

A. He staggered.

Q. Well, how wide are the steps?

A. About two feet.

Q. What is the breadth of the steps, front to rear?

A. That I can't say; they are made out of little pieces of——

[fol. 72] Q. They are made out of three little pieces of steel, isn't that it?

A. No, I do not think—yes, they may call it steel.

Q. Are the steps six inches wide?

A. I can't tell you exactly the measurement.

Q. Did you stand and watch Pankor go all the way down the three flights?

A. When he went down I went out on deck, and I came back.

Q. Did you stand and watch Pankor go all the way down the three flights into the engine-room, yes or no?

A. No, not right down.

Q. Now when you returned from the deck, and came into the grating Pankor was down below, wasn't he, with the second assistant?

A. Yes, sir.

Q. And Pankor was pointing up?

A. Yes, sir.

Q. And you had to look through three or four gratings?

A. What is that?

Q. I say when you were looking down into the engine-room to Pankor who was pointing up, you would have to look through three or four gratings?

A. No, there is a big space that you can see right down from the top of the ladder into the engineroom.

The Court: Through this spiral stairway?

The Witness: No, it is straight down.

The Court: Through the space you could see straight down?

The Witness: You can, it leans over this way.

The Court: And then it goes down again on the other [fol. 73] side?

The Witness: No, all on the one side. It is a turbine engine and there was a lot of space there you could see right down into the engineroom.

Q. Well, anyway, you said you did not have to look through anything?

A. Yes.

Q. Had a clear view?

A. Yes.

Q. Are there any ventilators in the engineroom?

A. Yes, sir, there are two.

Q. Were Jackson and Pankor standing anywhere near the ventilators?

A. They were standing by the telegraph.

The Court: What is that, the telegram?

The Witness: No, that is the telegraph, the place where they get the signals from the bridge.

Q. Who was pointing up?

A. The first assistant.

Q. The first assistant was pointing up?

A. Yes, sir.

Q. Now all this time that the first assistant was pointing up, were you standing on the top grating looking down?

A. That's right.

Q. And did you start down from the first grating at all?

A. No, I seen the second starting up.

Q. How long did you wait before the second assistant started up?

A. Not long.

Q. Well, how long?

A. Two or three minutes.

[fol. 74] Q. And all that time you were standing on the top grating?

A. Yes, sir, I came in from the deck.

Q. And then you saw the second assistant starting up?

A. Yes, sir.

Q. What did you do, just stay on the top grating, just waiting for the second assistant?

A. Yes, sir.

Q. Why didn't you go down in the engineroom where you belonged?

A. Well, I wanted to explain to the second assistant and ask him what was the matter with the first assistant, I wanted to tell him what the first assistant had done to me.

Q. To whom were you going to explain that?

A. To the second assistant, the man for my watch.

Q. You thought you would wait for a second, for the second engineer or the second assistant to come up to see you so you could explain it to him, is that right?

A. I waited, yes, sir.

Q. And you were waiting there for the second assistant, or was it that you were waiting up there to see what was going to happen?

A. I wanted to explain it to him, I did not think that he was going to hit me.

Q. Now when the second assistant got on the top grating, where were you?

A. I was right there.

Q. Well, did you say anything?

A. No, he said, "What to do with you."

Q. Did he hit you then?

A. Yes, sir. He said, "You ought to be down on your bloody watch."

Q. Did he use the word "bloody"?

[fol. 75] A. Yes, sir.

Q. And then he hit you?

A. Yes, sir.

Q. What did he hit you with?

A. With a monkey wrench.

Q. With which hand?

A. With the left hand.

Q. In the left hand he held a monkey wrench, and he hit you with his left hand?

A. That's right.

Q. Did he hit you in the eye first?

A. He hit me on the head, right here (witness indicating left side of head).

Q. Which side was that?

A. That is the left side of the head.

Q. And what did that blow do?

A. I fell back that way (indicating). It stunned me.

Q. And what did you do then? You say that it stunned you?

A. Yes, I staggered back.

Q. Did he knock you unconscious?

A. No.

Q. Where you fell down on the grating?

A. No, I did not fall down on the grating. I was on the deck when he hit me.

Q. Well, when did you leave the grating?

A. I stepped out while he was talking to me.

Q. Well, what were you talking about?

A. I was trying to explain what the "first" had done to me.

Q. You had talked first about what the "first" had done to you?

A. Yes.

Q. And you were standing on the grating?

A. Yes.

Q. And then you walked on deck?

A. Yes.

Q. Well, after you got on deck then Jackson hit you with a wrench in his left hand on your left side?

A. Yes.

Q. The left side of the head?

A. Yes.

[fol. 76] Q. And then you fell on the deck?

A. No, after he hit me on the eye I fell on the deck.

Q. Well, did you make any attempt to get up?

A. I ran on my hands and knees around the stern.

Q. At the end of the first blow?

A. He hit me on the head and I staggered back and then he hit me in the eye and I fell on the deck and then I got up and tried to run on my hands and knees around the stern. When I staggered back, why then he gave me another clip again.

Q. Did you fall down?

A. I fell against the deck.

Q. Did he hit you in the eye-ball?

A. I can't explain that, it was too sudden. I was blood from head to foot.

Q. Did you ever look at your eyes in the mirror right after the accident?

A. No.

Q. Do you know whether the eye-ball itself was bruised or scratched?

A. I can't say. The captain ought to be able to tell you that.

Q. In any event you were hit above the eye or below the eye?

A. Yes.

Q. And then you picked yourself up, is that right?

A. Yes, sir.

Q. And you started to run?

A. Yes, sir.

Q. Well, did you run fast?

A. Yes, sir, to get away from him.

Q. Did you run fast?

A. I don't know how fast. I was doing the best I could, staggering along.

Q. And he was chasing you?

A. Yes.

Q. He was drunk, was he?

A. Yes.

Q. Could hardly stand up?

[fol. 77] A. Well, he was not so sick.

Q. Did he stagger?

A. Yes.

Q. Was his speech thick?

A. Are you speaking?

Q. No, I say did he talk thick to you, was his talk thick?
A. Yes.
Q. Would you say he was pretty well along?
A. Yes.
Q. Three sheets to the wind, as they say?
A. Yes, sir.

Mr. Cuff: I object to characterizations.

Q. And he followed you all the way around to the stern of the vessel and to the starboard side?
A. Yes.
Q. Where was it you tripped and fell?
A. I tripped and fell over a steam casing from the engine-room on the starboard side.
Q. In which direction?
A. Across the ship it runs and it was on the starboard side.
Q. Across ship, and then parallel with the railing?
A. It comes out this way (indicating) and shoots up off there.
Q. Well, which part of the casing did you trip on, the part which runs across ship or that part which runs fore and aft?
A. Fore and aft.
Q. Fore and aft?
A. Yes, sir.
Q. Were you running that way when you tripped on it?
A. I was going forward.
Q. What is that casing?
A. It is a covering for a steampipe.
Q. Well, all that that casing is, is just a little metal [fol. 78] covered over some steampipe, is that it?
A. Yes.
Q. Which foot did you fall over?
A. I fell over it this way (indicating); I fell on my arm.
Q. I asked you which foot.
A. On my left leg.
Q. And were you running forward on the starboard side of the vessel?
A. Yes, sir.
Q. And the casing was between you and the ship's rail?
A. No, sir. It comes over from the engineroom across this way——

Q. You were between the casing and the ship's rail?

A. No, I was between the ship's rail and the engineroom.

Q. You were between the casing and the ship's rail, or you were between the casing and the bulkhead of the engineroom?

A. Here is the engineroom this way (indicating). The casing runs this way (indicating). Here is the engineroom (indicating). I ran from over there, and I tripped from over in here (indicating). It goes that way, and shoots over there.

Q. Did you trip on that part of the casing which runs across the ship?

A. Yes.

Q. And you tripped with your left foot and fell over the casing?

A. Yes.

Q. Did you fall flat on the deck?

A. Well, I felt myself going, and I fell on my arms, I believe there was blood there, they saw blood there the next morning.

Q. And you didn't hit your head, did you?

A. No, sir.

Q. And then you told the captain?

A. Yes, sir.

[fol. 79] Q. And the captain dressed your wounds?

A. Yes, sir.

Q. And then you went to bed?

A. Yes, sir.

Q. And stayed there until the next day?

A. Yes, sir.

Q. And the steward treated you too, did he?

A. Yes, sir.

Q. Did you ever sign any statement about this injury, how it happened?

A. What do you mean?

Q. Did you ever sign a written statement as to how this injury happened?

A. I signed a paper which the chief engineer read out to me.

Q. Did you sign a statement, which said that you were running along the starboard side of the ship and tripped and hurt yourself? Did you sign any statement like that?

Mr. Cuff: I object to that.

The Court: Objection sustained.

If you have a statement, let him see it and ask him if he signed that paper.

The Witness: They are supposed to have lost the one that the chief engineer read to me. Didn't you lose that, Mr. Wolfe, didn't you tell me that you had lost that statement?

Q. (Handing witness paper.) I ask you to look at this signature on the document and state whether or not that is your signature?

A. That is my signature.

Mr. Wolfe: I ask to have this document marked for identi-
[fol. 80] fication.

(The above statement was received and marked Defendant's Exhibit A for identification.)

Q. Will you state what this document, marked Defendant's Exhibit A for identification, is?

A. I did not read it.

Mr. Cuff: I object to that.

The Court: Objection sustained.

Q. You stated in your complaint that you signed a statement under compulsion.

A. I said what?

Q. You stated in your complaint that you signed a statement under compulsion.

A. I don't know anything about that, but he said to me, "It will be worth your while to sign that paper."

Q. And your claim is that you signed this paper under compulsion, is that right?

A. Yes, sir.

The Court: Do you understand what that means?

The Witness: I was not forced.

The Court: You were not forced?

The Witness: No, I was frightened.

Q. Will you please examine this statement and tell me whether the statements contained therein were made voluntarily by you?

A. I did not read it.

[fol. 81] The Court: How long after the accident was this paper signed?

The Witness: About five days after.

The Court: Did you read it?

The Witness: No, sir.

The Court: Did somebody read it to you or pretend to read it to you?

The Witness: Yes, sir.

The Court: Who?

The Witness: The chief engineer.

The Court: Do you know what is in it except what somebody else told you?

The Witness: No, sir.

Q. Did you have any conversations with the chief engineer leading up to making out this report?

A. No, sir.

Q. Did the chief engineer say to you, "Suppose we say that you fell on the deck?"

A. Yes.

Q. Will you state the circumstances under which this report was made out?

A. That is why he told me. He says, "Suppose we say you fell on the deck." I said, "You can't say that." He said, "Suppose we say you fell up against the hatches?" I said, "You can't say that, because there is guards around the hatches." He says, "Well, suppose we say you fell up against the bulkhead." I says, "You can't say that. It is about two or three or four feet above the deck."

The Court: What else?

The Witness: That's all.

[fol. 82] Q. During the time that this conversation was being had between you and the chief engineer, the chief engineer had this paper in his hand already made out, didn't he?

A. Yes.

Q. I am reading——

The Court (interrupting): You mean that his writing was on it?

The Witness: I don't know. All I know, it was a piece of yellow paper like that. That is all that I know.

Q. I am reading from page 46 of the record: "By the Court: When he had this conversation with you he wanted you to make out a statement of what happened. Is that the idea," and your answer was "No;" do you recall that?

The Witness: Yes, I think I do.

The Court: He had a statement already made out?

The Witness: I don't quite understand.

The Court: Did you say that to the Court at the last time, the Judge?

The Witness: I did not know it.

The Court: You didn't know what was in the paper?

The Witness: No.

Q. Do you recall the following, I am still reading from page 46; "It was already written out, was it," and your answer was "Yes, sir." Do you recall that?

A. That is my belief, yes.

[fol. 83] Q. Is that true, what you said before?

A. I told him I did not know what was on the paper except what the chief engineer told me.

Q. Do you recall the following; I am still reading from page 46: "I thought you said he started his conversation with you about this paper by saying, 'Suppose we say you fell over the hatch' " and your answer was "Yes, sir." But now you say it was all written out and your answer was, "Yes, sir, it was all written out"; do you recall saying that?

A. Yes, sir.

Q. Was it written out at the time the conversation was had with the chief engineer?

A. To my belief it was. Whether it was on the paper or not, I don't know; I can't swear, because I did not read it.

Q. Well, you told the Judge in the previous trial that it was already written out.

A. I don't know.

Q. Can you explain why at the last trial you said it was written out but now you don't know whether it was or not?

A. I don't know what was on the paper. I told you that before. All that I know it was a yellow paper.

Q. Did he read the contents of the paper to you after it was signed?

A. No, sir. He said, "It will be worth your while," that is all that he said.

The Court: He asked you whether he read the paper after you signed it.

The Witness: No.

[fol. 84] Q. I now read from page 46 of the record: "By the Court: What did he do with that paper finally," and your answer was, "He took it away with him," and the next question was, "Did he read it to you" and your answer was "yes, he read it to me in the afternoon. It was the same thing he was trying to tell me to say." Do you recall that at the last trial?

The Court: Where does this make any issue with the last trial?

Mr. Cuff: I object as not within the issues.

The Court: Objection sustained.

Mr. Wolfe: Exception.

Q. I read again from page 47, and do you recall the following: "By the Court: He had it all written out. Whatever it was you signed, you say he had it all written," and you said, "Yes, sir," and the Court's question was, "Before he came there" and your answer was, "Yes, sir" and the question by the Court was, "That is to say, when he came there he had it all written out," and your answer was, "Yes, sir," and the Court said, "Did you read it," and your answer was, "I can't read," and the question was, "Did he read something to you," and your answer was "He read it to me."

The Court: Wait a minute. The witness said that he did not read it. The witness said he read something to him. Your question was if he knew what was on the paper. If [fol. 85] you will read the paper to him now and ask him whether that is what was read to him, you probably will be able to get at the facts. Now listen, and tell us whether what he is going to read to you is what was read to you at that time.

Q. I now read to you from this statement: "Ran around the hatch and proceeded to the engine room, in poop deck I was going up to come on watch, and I believe that when I fell I either struck the hatch coaming or the pipe covering." Did you state that to the chief engineer?

A. No, sir.

Q. Is that what the chief engineer read to you before you signed this statement?

A. No.

Q. Will you tell us what the chief engineer did read to you?

A. He told me he says, Suppose we say"——

Q. I am asking you what he said to you, what he read to you.

The Court: But he says he did not read it to him.

Q. Did the chief engineer at any time after you signed this paper, ever read it to you?

A. No.

Q. Never?

A. No.

Q. At any time?

A. No, sir.

Q. I read again from page 46: "By the Court: Did he read it to you."

The Court: You read that before. You asked him the [fol. 86] question, and he answered the question.

Mr. Wolfe: Your Honor ruled me out on that because I had not proved that this man had said anything to the chief engineer about this.

The Court: I did not rule you out on that question.

Mr. Wolfe: I so understood.

The Court: No.

Q. In any event, do you state that what I have just read you is true or untrue?

A. It is untrue.

Q. And you deny that you ever told that to the chief engineer?

A. Yes, sir.

Q. You just signed the paper?

A. Yes, sir.

Q. He didn't read it to you before you signed it?

A. No.

Q. And the paper was all written out when he came to you?

A. I do not know whether it was written out or not. I only know the color of the paper.

Q. What was the condition of the chief engineer at the time this conversation about the paper was had?

A. He was intoxicated.

Q. Five days after he was intoxicated?

A. Yes, sir.

Q. How many conversations did you have with the chief engineer about this paper?

A. None.

Q. How many?

A. None, only when he spoke to me about it.

[fol. 87] Q. How many conversations did you have with the chief engineer about how the accident happened?

A. Only one, he dressed me once, he dressed my wounds and that is when he spoke to me about it.

Q. What was his condition at that time?

A. He was sober. He dressed my wounds at the end of the voyage.

The Court: If I understood you before it was the chief steward dressed your wounds.

The Witness: Yes.

The Court: And at the end of the voyage the chief engineer?

The Witness: Yes.

Q. Have you made any attempt to get a job going to sea at all?

A. No, I know it is no use.

Mr. Wolfe: I move to strike out the answer.

The Court: Strike it out.

Q. You have not been to see Walker & Daly since the accident happened, except when they gave you the $20?

A. Only when I got the money. I never went near them.

The Court: I think at this time gentlemen, we will take a recess until ten-thirty A. M.

(Whereupon an adjournment was taken at 5:00 P. M., until 10:30 A. M., July 27th, 1928.)

[fol. 88] July 27th, 1928.

Trial resumed.

ROBERT CAIN resumed the stand:

Cross-examination continued.

By Mr. Wolfe:

Q. Yesterday, when I showed you this paper, (Exhibiting paper) you said that that was your signature. Is that right?

A. Yes.

Q. And your name on that paper is spelled K-a-n-e. Is that your real name?

A. No, sir.

Q. Well, what is your real name?

Q. Well, what is your real name?

A. My real name is C-a-i-n.

Q. Well, why did you spell it K-a-n-e when you signed this paper?

A. Well, that was because the shipping agent, he said, put it down the same way as it is on the articles.

Q. Did you sign your name on the articles?

A. Not at that time, no sir, but I read it Kane to him, and they told me to put it down K-a-n-e, that they both sounded the same.

Q. Who told you that?

A. The shipping agent.

Q. The shipping agent told you to spell your name K-a-n-e?

A. Yes, sir, he said that it sounds the same.

Q. Did you have any discussion with him about that?

A. No, sir.

Q. He said just spell it K-a-n-e?

A. Yes, sir, he had it already written out.

[fol. 89] Q. At the time that Jackson assaulted you, the first time that you were hit, was Jackson facing you immediately in front of you?

A. Not right in front of me. He was standing there (indicating). And I was standing like that (indicating). I was standing that way (indicating).

Q. Was he in front of you?

A. Yes, he was standing there (indicating). He was standing like this (indicating).

Q. Directly in front of you?

A. Not exactly in front.

Q. Not exactly in front?

A. No, sir.

Q. That is the only statement which you signed on the Alpha, isn't it?

A. Yes, sir.

Q. I understood you to say yesterday that you did not know the contents of that statement, is that correct?

A. Yes, sir.

Q. Didn't you read the complaint in this case?

A. I don't remember.

Q. Did you swear to the complaint in this case? Did you swear to what was on this complaint, or what was in this complaint, did you swear that that was true?

A. I did not sign that statement. I do not know what you are talking about.

Mr. Wolfe: I call for the production of the original complaint.

The Court: I don't find it here with my papers.

Mr. Cuff: I haven't got it. But I will concede that he signed the complaint.

Q. Your counsel concedes that you swore that you signed [fol. 90] the complaint——

The Court: Where is the original complaint?

Clerk of the Court: In the Clerk's office, I guess.

The Court: Well, go get it. Wait a minute. There is attached here a provision of the bill of particulars, but there is not attached the provision of the complaint, not before me.

Mr. Wolfe: Well, as counsel concedes that he signed it——

The Court: Well, let's get it, let's get the original. Take up another matter, take up some other point and get the original.

Q. Do I understand you correctly, or did I understand your testimony yesterday, did you state that Mr. Pankor hit you with his right hand or left hand?

A. I may have told his right hand, I mean his left hand, but I made a mistake.

Q. But you said yesterday the left hand, is that right?

A. Yes, sir.

Q. Where were you standing when Mr. Jackson hit you the first time?

A. On the deck, sir.

Q. And where were you when Mr. Jackson arrived at the top of the grating, or at the top grating?

A. I was on the top grating and when he arrived there——

Q. You were on the top grating when he arrived there, [fol. 91] and then ran to the deck when he hit you, is that correct?

A. I did not run to the deck I stepped out on the deck, yes, sir

Mr. Wolfe: I call attention to page 102 of the record of the last trial.

Q. Before I read that I will ask you this: after you were hit by Mr. Jackson, did you run out any door?

A. I went out when I was talking to him, while I was talking to him, before the accident or before the assault.

Q. I asked you if you ran out of any door after you were hit the first time?

A. No, sir.

Q. The only door opening there was the door from the engine room out to the deck?

A. That's all.

Q. Do you recall the following. I am reading from page 102 of the record of the previous trial:

"Staggering then, you ran out the door?" And your answer was, "No, I did not run out, I walked." Do you recall that? Did you say that?

A. I don't remember.

Q. If you did say it, was it true?

A. No, I did not really walk, I was talking to him, and then I stepped out, and when I was talking to him I stepped out on the deck.

The Court (receiving original complaint): The complaint is verified.

Q. Did you read the complaint over?
A. I don't know what you mean.

[fol. 92] The Court: Did you read this document over before you swore to it? (Exhibiting the original complaint.)
The Witness: No, sir.

Q. That is the second document that you signed without reading, isn't it?
A. I don't know what document you are talking about.
Q. I call your attention to paragraph 16 of the complaint (quoting) "that the defendants with full knowledge of the assault by the engineer, Jackson, upon the plaintiff as above stated, and with full knowledge of all the circumstances thereto did, by their agents, servants, and employees, intimidate the plaintiff and did compel him while he was on the ship and while the ship was on the voyage back to the United States, and while the plaintiff was in an intoxicated condition, to sign a statement that the aforesaid injuries were sustained by a fall, while the plaintiff was intoxicated, which statement is and was wholly untrue." Now you state that you don't know?
A. I don't know.
Q. The contents of that document which you signed you don't know, is that correct?
A. Correct.
Q. Did you tell your counsel that you signed this statement, that you were drunk and fell down?

Mr. Cuff: Just a minute. May I move to have that part of the question stricken out, where the reading was done from the complaint. I don't see that it contradicts any-[fol. 93] thing. It is quite unimportant. I don't see the point.
The Court: What statement are you attempting to contradict by this?
Mr. Wolfe: The plaintiff says that he does not know what is in the statement.
The Court: Well, how are you contradicting it by what is in the statement?

Mr. Wolfe: I asked him if he signed any other statement aboard the vessel except this, and he says no. He alleges in his complaint that he did sign this statement and that he was drunk and fell down. That is stated all the way through, and now he states that he did not know what was in that statement.

The Court: No, he said he did not know there was anything on there when he signed it, or whether there was not. He said further that somebody read it to him, but whether they read what was on that statement or not he cannot say. That is his testimony so far, as I recall it.

Mr. Wolfe: I understood, your Honor, that he does not know whether this—that he was drunk or not.

The Court: If that statement that you got says that he was drunk, then there is no contradiction. If that statement does not say that he was drunk, then there is a contradiction.

[fol. 94] Mr. Wolfe: I have read the statement to him, and he said, no, that was not what was read to him.

The Court: You mean in regard to drunkenness?

Mr. Wolfe: No, about falling down.

The Court: Well, where is that contradicted?

Mr. Wolfe: Now he says he did not know what was in the statement, but he alleges in his complaint——

The Witness: I said I signed it but I did not know what was on it. Anyway, that is not the paper that you had in the last trial, Mr. Wolfe. You told me yourself that you could not find it.

Q. Did you ever sign any statement on board the Alpha, or any other place, in regard to this accident that you had, that you were intoxicated and fell down and hurt yourself?

A. Not intoxicated, no.

Q. You never signed any such statement?

A. Not intoxicated, no. Only what you read out to me.

Q. I call your attention to paragraph 16 of the complaint in which is admitted you swore that you were compelled to sign the statement that the aforesaid injury was sustained by falling while the plaintiff was intoxicated.

A. No, I asked you——

Q. Is that true? Did you sign a statement that you were drunk and fell down?

A. The statement that I signed——

Q. Yes or no.

A. Well, please let me explain, will you, please?

[fol. 95] Q. I ask you to please answer my question.

The Court: Do you understand the question?

The Witness: No.

The Court: Now listen to me. He asked you whether you ever signed any statement which said that you were drunk and fell down. Not whether the statement is true or not, but did you ever sign such a statement?

The Witness: No.

The Court: Now he asks you, if you didn't sign such a statement, how did you come to swear that you did sign such a statement?

The Witness: I am talking about the one that he read out to me.

The Court: You mean that it is not that statement, and that you did not know what was on it at the time you signed it; is that the statement?

The Witness: Right.

By the Court:

Q. Did you find out afterwards what was in that statement?

A. No, sir. They said they had lost it. It was lost. I never seen it afterwards.

Q. How did you come to say here that you signed the statement, you were drunk and they made you sign it?

A. I mean that paper there. He did not read it out.

[fol. 96] Q. Did he read at that time that you were drunk?

A. No, sir.

Q. What did he read?

A. "Suppose we say you fell over the hatch?" And I say, "You can't say that."

Q. You don't seem to understand me yet. You can never understand unless you listen. In this complaint here you swore that they made you sign a statement saying that you were drunk, and that the drunkenness made you fall. Now how did you come to say that?

A. I don't know.

By Mr. Wolfe:

Q. You didn't tell your counsel that you signed a statement that you were drunk and fell, did you?

A. No.

Q. You don't know where Mr. Cuff got that information?

A. No.

Q. You didn't give it to him?

A. No, I didn't give it to him.

Q. I understand you to say, Mr. Cain, that the only time the chief engineer was drunk was the time that he made you sign the statement, is that correct?

A. Yes, he was drunk, then, yes.

The Court: Wait a minute: You have asked him whether the only time the chief engineer was drunk was when he signed the statement. How can he answer that? How does he know whether the man was ever drunk before in his [fol. 97] life or not?

Q. Well, you went to see the chief engineer several times, the times that he dressed your head?

A. At the end of the voyage.

The Court: The chief steward dressed him during the voyage.

Q. Did you see the chief engineer during the four days after you were hurt?

A. Yes, sir.

Q. And you saw him every day there for a while after you were hurt, didn't you?

A. Not every day.

Q. Well, every other day. How many days after the accident was it that you signed the paper?

A. About five days.

Q. Did you see him before the five days at all?

A. Yes.

Q. Did you see him the first day after the accident?

A. Yes, sir.

Q. Did you see him the second day?

A. Yes, sir.

Q. Did you see him the third day?

A. Yes, sir.

Q. Did you see him the fourth day?

A. Yes.

Q. Did you see him the fifth day?

A. I don't know, I don't remember about the fourth day.

Q. Did you see him the first day?

A. Yes.

Q. Was he drunk or sober?

A. He was drunk all the time.

Q. Do I understand you correctly to say that the only [fol. 98] time he was drunk was when he made you sign this statement, was that what you testified to yesterday?

A. I may have said it, but he was drunk these days when I seen him. I said he was drunk at the end of the voyage.

Q. At the time you were hit by Mr. Jackson, you stated that he hit you with a wrench, had a wrench in his left hand?

A. Yes.

Q. Was it open or closed?

A. It was partly open.

Q. What size wrench was it?

A. Well, I can't say the size.

Q. Were you hit in the eye ball?

A. I can't swear to that.

Q. Do you recall testifying about where you were hit at the last trial?

A. I was hit under the eye and over the eye.

Q. I call your attention to page 101 of the record of the last trial, do you recall testifying as follows in that trial: "Where did he hit you the second time?" and the answer was "In the eye (indicating)". And then the question was asked you: "Where?" and your answer was, "Right here (indicating)" The question was asked, "Under your eye-ball?" and your answer was "Well, it was between the top of the eye-lash and the bottom of the eye-lash."

A. I may have. It was right here (indicating).

Q. You mean between the top of the eye-lash and the bottom of the eye-lash? Did you mean by that eyeball?

A. I can't say.

[fol. 99] Mr. Cuff: I move to strike out the answer.

The Court: Strike it out.

Q. If I recall your testimony correctly, Mr. Cain, you stated yesterday that you stood on the top grating and

looked down and saw Mr. Pankor the first assistant and Mr. Jackson the second assistant standing by the telegraph?

A. Yes, sir.

Q. That is correct, is it?

A. Yes, sir.

Q. You stated, didn't you, that you didn't have to look through any grating to see that?

A. Quite right.

Q. That is correct?

A. Yes.

Q. You are quite familiar with engine rooms, aren't you, Mr. Cain?

A. Yes, sir.

Q. Is there a large steam pipe that runs right over the top of the telegraph?

A. No, not over the telegraph, no, sir. There is a steam pipe that runs over the deck, yes, but not over the telegraph?

Q. Do you recall, Mr. Cain, yesterday whether—I will withdraw that.

Q. Do you recall, Mr. Cain, whether there was any canvas underneath the gratings or around the edge of the gratings?

A. No, we had taken them down before that, and we had cleaned them and painted them. I remember that.

Q. Did you ever make any statement to the first assistant engineer, Mr. Pankor, after the accident, that you fell down and were drunk and that it was your fault?

A. No, sir.

[fol. 100] Q. Did you ever make any statement to the captain, immediately after the accident, that Mr. Pankor was the man who assaulted you, and that he hit you in the head with a hammer?

A. No, sir, I told him that Mr. Jackson hit me.

Q. Just answer yes or not.

A. I said Mr. Jackson, I did not say Mr. Pankor.

Q. Will you tell us what the duties of a fireman are aboard the vessel?

A. Well, which kind of a job are you going to talk about, a coal burner or an oil burner?

Q. Well, let's talk about a coal burner?

Mr. Cuff: Why take a coal burner when this is an oil-burner?

The Witness: Talk about any one at all. I can answer you.

Mr. Wolfe: This man has testified that he can't work as a fireman, and I think I am entitled to find out what the duties are.

The Court: All right, he may answer. Go ahead.

Q. Tell us the duties of a fireman on a coal burner?

A. Well, the fireman shovels coal, cleans the fire, takes the ashes out, and watches the steam. On a coal burner he does not look after the water because he has a water tender.

Q. Now you can shovel coal, can't you?

A. Yes.

Q. You can haul ashes, can't you?

A. Haul ashes?

Q. Haul ashes, yes.

A. Yes.

[fol. 101] Q. And you can watch a water gauge, can't you?

A. I could have, but not any more, not now.

Q. I mean at the present time can you watch a water gauge?

A. No, I would not swear to it.

Q. Why?

A. Well, I would not know whether she was showing by clear glass or false glass, it may be showing through true glass and I would not see it with only the one eye.

Q. Well, your right eye is all right, isn't it?

A. Not as strong as it was.

Q. Well, that has got nothing to do with this accident, has it?

A. I can't say as to that. I had good eyesight when I joined that ship. I never wore glasses then but I have to wear them now.

Q. Didn't you tell me that aboard a coal burner the fireman does not have to watch the water?

A. Yes.

Q. Well, what duties is there as a fireman on a coal burner that you can't perform now?

A. I beg your pardon?

Q. I say as a fireman what duties are there on a coal burner that you cannot perform now?

A. I cannot keep my fires nor clean my fires, it would affect my eyes. All the dust would go into my eyes.

Q. How?

A. The coal is likely to get into my eye. I am only looking out of one eye now.

Q. Well, how would it affect your eye?

The Court: He said the coal dust would get in his eyes.

[fol. 102] Q. Well, that dust would go in, whether your eye was injured or not?

A. No.

Q. You get coal dust in your eyes anyhow, don't you?

A. Yes.

Q. And is your left eye sore at the moment?

A. No.

Q. Then the only reason you could not work as a fireman on a coal burner is because you would get coal dust in your eyes?

A. Well, not exactly.

The Court: Let him finish his answer.

The Witness: You see, I might be going across down by the fire room, and there might be a straight rake there, or a cracker-bar, and I might trip over it, not seeing it, and cause another accident. You can't see anything for ten minutes afterwards, after you have cleaned a fire.

Q. Is that the same whether you can see out of both eyes or only one eye?

A. Yes.

Q. So that has nothing to do with that, has it?

A. No.

Q. That has nothing to do with it?

A. No.

Q. I am not certain that I understood you Mr. Cain. The exact position of Mr. Jackson at the time that he hit you.

A. Well, I was standing that way (indicating) and when he struck me first, struck me the first blow, I went back like this (indicating).

Q. Was he directly in front of you?

A. I can't explain that exactly.

[fol. 103] Q. Well, please answer yes or no, if you can. Was he on your right side?

A. He was more on my left side and I was more on his right.

Q. You were on his right side?

A. More so.

Q. And he was facing you and you were on his right, is that right?

A. If you will give me a chance to explain, if you will come over here I will show you just what I mean by illustrating it with you and you can understand me better.

Q. Well, you understand directions, don't you?

A. Yes.

Q. Well, please answer yes or no, if you can. Was Mr. Jackson more on your right side or more on your left side?

A. More on the left side.

Mr. Wolfe: That's all.

Redirect examination.

By Mr. Cuff:

Q. Now, Mr. Cain, you were asked the question yesterday by Mr. Wolfe when he read from the record of the last trial, at page 86, the question was "Where did you stand your twelve to four watch in the afternoon?"—wait a minute. I have got the wrong one. On page 87 I read to you. You were asked this question: "On the afternoon of the 5th, did you stand your twelve to four watch?" and your answer was "Yes, sir." You made that answer to that question, [fol. 104] didn't you, when Mr. Wolfe was cross-examining you at the last trial?

A. Yes, sir.

Q. Now I call your attention to page 17 of the record of the last trial and ask you if you recall these questions and answers being put to you with reference to the exact same thing; I read from page 17:

"Q. Do you recall the 5th of February?

A. The early in the morning.

Q. About twelve-thirty or twelve-forty A. M.?

A. Yes, I had been called about half past eleven.

Q. What time did you have supper that day?

A. About five o'clock or a little after.

Q. Where?

A. In the mess room.

Q. On the boat?

A. On the boat.

Q. And after supper?

A. After supper I went right to bed. I was tired and I turned right in to bed.

Q. And you turned right in to your bed because you were tired?

A. Yes, sir.

Q. Where had you been that day?

A. I had walked ashore and I was ashore about ten o'clock.

Q. You left the boat about ten o'clock in the morning?

A. Yes, sir.

Q. What time did you return to the boat?

A. About half past four, I should say, or near that."

Q. Now, you were talking then about February 5th, weren't you?

A. Yes, sir.

Q. And in the examination you stated you were ashore on February 5th, didn't you?

A. Yes, sir.

[fol. 105] Q. Now, Mr. Cain, under cross-examination by Mr. Wolfe, concerning the same matter at the last trial, you were asked this question (reading from page 88):

"Q. Now then on the afternoon of February 5th, that is, the day before the assault happened, did you stand a twelve to four watch?" And your answer was "Well one——" and he asked this question, "Answer yes or no please." And your answer was, "No." And then he asked you the question, "Now you have changed your testimony on that?" And your answer was "No. I want to ask a question, sir. Between the 6th and the 7th the accident happened."

Do you remember those questions and your answers thereto?

A. Yes.

Q. Now, when you said the 6th and the 7th, you were mistaken, weren't you?

A. Yes, sir.

Q. The accident happened between the 5th and the 6th, didn't it?

A. Yes.

Q. And there wasn't any question about that, was there?
A. No.
Q. There is not any contention on the part of the captain that you came to him at one o'clock on the morning of the 6th of February, is there?
A. No.
Q. And when you were asked that question that the accident happened between the 6th and 7th, did counsel tell you you were mistaken, or did he let you go right on and make the mistake?
A. He never told me.
Q. Now I call your attention to his examination, the ques-[fol. 106] tion at page 92 of the old record, concerning the same matter:

"Q. Well, you were hurt on the morning, the morning?
A. Yes.
Q. Of February 6th?
A. Yes, sir.
Q. At one A. M.?
A. You know what I mean, no.
Q. Don't you know what I mean by one A. M.?
A. Yes.
Q. Now do I understand you to say that on the very morning after you were hurt you went ashore and took a walk?
A. No, not that morning. It was the morning before.
Q. That would be February 5th?
A. I don't know the exact date, sir, exactly.
Q. Well, you were ashore the morning before the date you were hurt?
A. Yes, sir."

Q. Now that morning was February 5th, wasn't it?
A. Yes.

The Court: You are now arguing.

Q. You wanted to demonstrate how you were hit. Demonstrate, using me as Jackson, if you want. Show us what happened.

Mr. Wolfe: I object to that, if your Honor please.
The Court: Objection overruled.
Mr. Wolfe: Exception.

A. I was standing right over there. (Witness arising from chair and indicating.) And he had a flashlight in his right hand. He says to me, what is the matter with me? [fol. 107] And I explained and said what was the matter with the "first." I stepped back this way (indicating), and he struck me like that (indicating)——

Q. Struck you where?

A. On the head, right there (indicating).

Q. And how did your head go?

A. Right back that way (indicating).

Q. And while your head was in that position he hit you over the eye with the wrench? Is that right?

A. Yes, sir.

(The witness indicates that he leaned toward the right, and that his left eye was upwards.)

The Witness: May I ask a question, your Honor?

The Court: Yes.

The Witness: Mr. Wolfe, will you please let me know was it the right hand or the left hand that Mr. Jackson——

Q. You don't need to bother about that.

A. Well, I don't know whether he hit me with the right hand or——

Q. He hit you with a wrench, didn't he?

A. Yes.

Q. He had a wrench in his left hand, didn't he?

A. Yes.

Q. Now, Mr. Cain, Mr. Wolfe asked you a question, he asked you about the ships that you have worked on before. Have you a book in your pocket known as a Board of Trade book? Is that a record of all the ships you have served on, and your discharges, and regarding the character and the length of time employed, and the length of [fol. 108] time you were out of work?

A. Yes, sir.

Mr. Cuff: I offer it in evidence.

Mr. Wolfe: I object.

The Court: Objection sustained.

Mr. Cuff: I withdraw the offer.

Q. Now, Mr. Cain, when you signed the articles you signed "K-a-n-e" on the articles. Will you just tell the jury if you signed the articles was the name K-a-n-e or C-a-i-n on there?

A. It was K-a-n-e on there.

Q. K-a-n-e?

A. I told them to put down C-a-i-n, but he said to sign it K-a-n-e, it sounded the same.

Q. Well, was it typewritten on?

A. No, written.

Q. He asked you to write the name K-a-n-e so that your name would appear the same as on the articles themselves?

A. Yes.

Q. You have no reason to conceal your right name, have you?

A. No, sir.

Q. And this is your right name that you are suing under in this case, that you are using here in this case?

A. Yes, sir, I have letters here to prove it.

Q. Explain about the grating, that is, on the deck where you were struck. Give us some idea about that. Is it even with the deck, flush with the deck, or is there a step-up, and how big is it ?

A. Well, there is a little step. The grating then goes to the bulkhead, and then comes a step about as big as——

Q. How about this floor here, is that a good way to in-
[fol. 109] dicate? (Pointing to floor at foot of witness stand.)

A. It was a little bit higher than that. The grating goes out like this (indicating), and that is a piece of iron. And then the step is here (indicating). I was standing like that with one foot on the step and one foot on the grating and I just stepped back like this (indicating) when he came.

Q. When you get on the deck you step up from the grating, is that it?

A. Yes, sir.

Q. Well, the grating is the metal part of the stair-case and the wooden part is the deck of the boat, is that right?

A. Yes.

Q. Well, how big is the grating, how big would you say in feet?

A. Well, it goes from about there to there (indicating).

The Court: About two feet?
The Witness: Well, a little over two feet.
The Court: Square?
The Witness: No, oblong.

Q. Now, Mr. Cain, this paper that Mr. Wolfe was speaking to you about, calling it the complaint, that is the paper that you made out to bring your case in the court?
A. Yes.
Q. And you have signed it. That is your name signed on the end of it, isn't it? (Handing witness paper.)
A. Yes, sir, that is my handwriting.
Q. No question about that, is there?
A. No, sir.
Q. You know the statements that are in that paper. That is the paper about your case.
[fol. 110] A. Yes.
Q. It is set forth as the lawyer wrote it out?
A. Yes.
Q. You didn't write it yourself?
A. No.
Q. And you swore to those statements, didn't you?
A. Yes.
Q. And you swear to those statements now?
A. Yes.
Q. And you are willing to stand on that as they are now?
A. Yes.
Q. Now after the chief engineer got to New York, counsel asked you about your talk to him. Did you have any conversation with him about the last day he was there?
A. Yes.
Q. What did he say to you?
A. He told me that I am sorry I can't take you to the hospital. Go to the captain or to the third officer and get a note. I went to the third officer, because the captain was not aboard, and I came back and said I have got the paper to go to the hospital.
Q. That is, you came back to the chief officer?
A. Yes.
Q. Well, what was said by the chief officer, I mean about himself?
A. He said I am fired——

Mr. Wolfe: I object.
The Court: Objection sustained.

Q. Indicate with your hand, Mr. Cain, the size of the wrench with which you were struck?
A. Well, it was a large size (indicating about fourteen inches). There is different size monkey wrenches.
Q. You have worked as a fireman for how many years, [fol. 111] Mr. Cain?
A. Eighteen years as a fireman and two years on the deck.
Q. Now, tell the jury, could you work as a fireman any more?
A. No, sir, I would not chance it.
Q. You are just as anxious to get a job and earn a living as anybody, aren't you?
A. Yes.
Q. If you could go back to firing, you would if you could, wouldn't you?
A. Yes, but I can't do it. There is no sense in my signing to go on a ship and then after an accident be laid up for the rest of the trip.

Mr. Wolfe: I move to strike out the answer.
The Court: Strike it out.

Q. Now one more question, Mr. Cain. With respect to that watch in the afternoon of the 5th, can you remember how many questions you were asked at the last trial about that?
A. I cannot.
Q. You were asked a great many, weren't you?
A. I can't tell you. Yes, a number of them.

Mr. Cuff: That's all.

Recross-examination.

By Mr. Wolfe:

Q. Mr. Cain, would you take a job as a fireman on a ship if you were offered one?
A. I beg your pardon?
[fol. 112] Q. I say would you take a job as a fireman on a ship if you were offered one?

A. No, sir.

Q. I get the impression from your testimony that at the last trial you told your counsel that you were mixed up about these dates, is that right?

A. Yes, sir.

Q. You were mixed up, were you?

A. Yes, sir.

Q. Well, now I read from page 89 of the old record. Do you recall this———

"By the Court: Mr. Cain, you must answer the question that is asked you, and if you have any misunderstanding of the question, you may say so, and you will have a full opportunity to explain if you have been misunderstood, but in the meantime you must answer the questions and not ask them.

Q. Now I will return once more to the afternoon of the 5th. We will take it up by date so that there will be no mistake. On the afternoon of the 5th, did you or didn't you stand the twelve to four watch?"

The Witness: No.

Mr. Wolfe: I am not through yet. And your answer was "Yes."

Q. Now at that time, do you mean to tell the Court and jury, that you did not understand what date I was talking about?

A. Not exactly.

Q. Did you or didn't you understand by the date?

A. No.

Q. I read further from page 89:

[fol. 113] "Q. Now were you ashore on the date of the 5th at all?" And your answer was, "No, sir."

Q. Do you recall testifying to that?

A. Yes.

Q. Was that true?

A. No.

Q. Did you misunderstand the question also at that time?

A. Yes, sir.

Q. Do you recall the following, reading from page 89 of the record:

"Q. You stood the twelve to four watch in the afternoon?
A. Yes."

Do you recall that?
A. I may have said that but I did not mean it.
Q. Was it true?
A. No. It could not be true, I could not be ashore and tending a watch.
Q. Well now I read from the same record: "Well, did you go ashore on the morning of the 5th at ten-thirty?" And your answer was "No, sir." Do you recall that?
A. I went ashore on the 5th.
Q. Did you say that at the last trial?
A. I don't remember.
Q. Well, if you said it, was it true?
A. I went ashore, so how can it be true?
Q. Do you recall the following, reading from page 90:
"Q. You were aboard ship on that day?
A. All that day."

Do you recall testifying to that?
A. I might have, but I mean the 4th. I was talking about the 4th at the time.
Q. Do you recall testifying to that effect?
A. Yes.
Q. Now I ask you if you recall this question which I [fol. 114] asked you at the last trial:
"And you worked from twelve to four in the afternoon?
A. Yes, sir."

Do you recall that?
A. I am mistaken.
Q. Now I read to you the following question from the old record:
"Q. You had your supper aboard the ship?
A. That's right.
Q. Then you went to bed?
A. Yes.
Q. And now you were ashore the night of the 5th?
A. No, sir."

Now you knew what date I was talking about?
A. No, you had us all mixed up, even one of the jurors had to ask you what date you were talking about. I did

not know whether you were talking about the 5th or the 6th or the 7th.

Q. Do you know what date the accident happened?

A. Yes, in the morning.

Q. What date?

A. On the 6th.

Q. You knew that then, didn't you?

A. Yes.

Q. You knew that the 5th of February comes before the 6th of February, didn't you? Answer yes or no.

A. What do you mean?

Q. Did you know that the 5th of February comes before the 6th of February?

A. Yes, sir.

Q. Now do you recall this, from page 90:

"Q. Do you deny that you were drunk on the night on the 5th and the morning of the 6th?

A. Yes, sir."

You knew what date I was talking about then?

A. No.

Q. I asked you if you knew what date I was talking [fol. 115] about?

A. I could not have known.

Q. I ask you if you know what date?

A. No.

Q. You did not know I was talking about the 5th or the 6th?

A. I was on the boat on the 5th.

Q. I asked you if you knew what I was talking about?

A. No.

Q. Well, when I said "You were awakened at eleven-thirty that evening?" you said, "Yes, sir." Did you understand what evening I was talking about then?

A. No, what evening are you talking about.

Q. Now I call your attention to the following from page 93 of the record——

Mr. Cuff: Will we proceed with this indefinitely, your Honor? We have admitted that the man was confused about those dates.

Mr. Wolfe: There is nothing that you can admit that will help us or help out matters.

The Court: He may proceed.

Q. Now I call your attention, Mr. Cain, to the following from page 93 of the old record:

"By the Court:

Q. This 6th is the date you just told us you were hurt, the early morning of the 6th?"

Do you recall that?

A. I don't know.

Q. Didn't you understand the date?

A. Yes, the date.

[fol. 116] Q. Well, the Court said, reading from the same page, page 93: "Then counsel has asked you what time you were ashore on the 5th and you said you got back at five o'clock," and then you said—that is, the witness—that means you: "I was back about the fifth." You understand, or you did understand at that time, that you were talking about the 5th?

A. We were all mixed up, we were mixed up altogether. I said at that time and I will know what you are talking about.

Q. When you said to the Court at the last trial that I was talking about the 5th of February, you knew what date you were talking about, or what date I was talking about, didn't you?

A. I can't tell you exactly. I asked you what date you were talking about.

Q. Well, now, I read from page 94 of the record: "Let's get this straight. You went ashore at ten-thirty on the morning of the 5th?" And your answer was, "Yes, sir." Q. Did you know at that time that I was talking about the day before the accident?

A. Yes, sir.

Q. That is the only time you knew?

A. Yes, sir.

Q. Well, I read from the record: "You came back about the 5th of February." Did you know what date that was?

A. Certainly.

The Court: That is not contradicting anything now. We [fol. 117] have been having pages read, pages 17 and 19 and 91 and 92 and 93 and now we have page 94. What is that contradicting. This has got to stop.

Mr. Wolfe: Is that your Honor's ruling? No more questions on that subject?

The Court: I rule on that unless it is going to be contradictory to what he has now said.

Mr. Wolfe: Exception.

Q. With reference to the signed articles, Mr. Cain, I believe you said the Shipping Commissioner told you to sign your name K-a-n-e?

A. Yes.

Q. Where does he get that spelling of your name? Where did the Shipping Commissioner get that spelling?

A. I signed my name to it.

Q. And he asked you what your name was?

A. Yes, and I said Caine.

Q. And then you wrote K-a-n-e?

A. Yes, sir.

Q. And you signed on other voyages?

A. Yes.

Q. Well, on the other voyages did you sign it K-a-n-e?

A. Yes, only once, when I was signed as a wiper. Then I put down the name C-a-i-n.

Q. Part of the time C-a-i-n and part of the time K-a-n-e?

A. Yes, sir.

Q. Did you tell the Shipping Commissioner at the time you signed the name K-a-n-e that that was the correct [fol. 118] spelling?

A. I signed that at the Barge Office.

Q. Did you tell the Shipping Commissioner whether it was the proper spelling or not?

A. He did not ask me.

Q. You just put it down?

A. Yes, sir, my right name is C-a-i-n.

Q. Did you ever have any disagreement with Jackson at all?

A. None.

Q. You never had any trouble with Pankor?

A. No.

Q. Did you ever have any trouble with Mr. Woodbury?

A. None, not aboard ship.

Q. Did you ever have any trouble with the captain?

A. No, sir.

Q. And you can think of no reason why the men should hit you?

A. Only because I was late for my watch.

Juror No. 1: If your Honor please, I would like to ask the witness one question.

The Court: You may.

Juror No. 1: Can you read?

The Witness: Not much.

Juror No. 1: Very poor?

The Witness: Yes, I have been going to sea since I was thirteen and that is the cause of that.

By Mr. Cuff:

Q. I read to you from page 92 of the record: "And you were hurt on the morning of February 7th around one A. M.? And your answer was, "I don't get you." Do [fol. 119] you remember his saying that, Mr. Wolfe saying that to you at the trial?

A. I don't exactly remember.

Q. Well, was that February 7th that he said?

A. Yes.

Q. Well, it was not February 7th, was it?

A. No.

The Court: Don't let's argue.

Q. With respect your name, have you receipts of any kind?

The Court: What is the difference?

Mr. Cuff: Just to show there is no concealment.

The Court: This K-a-n-e and C-a-i-n sound exactly alike. I do not see anything in that.

Mr. Cuff: That is all.

Mr. Wolfe: That is all.

(Recess until two P. M.)

Afternoon Session, 2.00 p. m.

Robert Cain, recalled, testified as follows:

Cross-examination.

By Mr. Wolfe (continued):

[fol. 120] Mr. Cain, I am not entirely clear as to which part of the casing you said you fell over. Did you fall

over the part that goes across the ship or the part that goes up and down the ship?

A. Across the ship, the part that goes across the ship.

Q. And did you state on direct examination that you fell on that part of the casing which ran fore and aft?

A. I told them the piece that went across the ship.

Q. Will you please answer yes or no. Did you state in your direct examination that you tripped over that part of the casing which ran fore and aft?

A. Yes.

Q. Is that true?

The Court: I don't understand what you mean. If this is a ship (Court draws sketch) there is the stern, we will say. Here is the deck. This is fore and aft, and this is athwart. Where was it that you tripped? Did you trip against the piece that was running fore and aft or did you trip against the piece that was running across, athwart the ship?

The Witness: Yes.

The Court: Why did you say running fore and aft?

The Witness: Running into the fore and aft piece.

The Court: As I understand it you said the piece running fore and aft, and then I believe you said the other piece.

Q. I don't understand him yet, your Honor.

The Court: He says he fell across the piece that runs [fol. 121[athwart the ship, the piece running into the piece that runs fore and aft.

Q. Did you trip over that part of the athwart ship piping or casing that is on the starboard side of the port side?

A. The starboard side.

Q. And that was about abreast of the starboard alleyway or passageway?

A. Alleyway? There is no alleyway. There is a well-deck that goes down.

Q. That is the deck which lies between the starboard engineroom bulkhead and the starboard rail of the vessel, is that right?

A. Yes.

Mr. Wolfe: That is all.

By Mr. Cuff:

Q. You are not a citizen of the United States?
A. No.
Q. And you have no right to remain in this country except for the purposes of this trial?
A. No.

Mr. Cuff: That is all.

By Mr. Wolfe:

Q. That is not why you signed your name K-a-n-e, is it?
A. No.

The Court: Now, now, now.

[fol. 122] Dr. David T. Bishop, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cuff:

Q. Now Dr. Bishop, where is your office?
A. 117 Montague Street, in Brooklyn.
Q. Are you a licensed physician in the State of New York?
A. I am.
Q. And you specialize in eye trouble, do you, doctor.
A. I do.
Q. Will you state what institutions you have been connected with and what experience you have had in the treatment of the eyes?
A. I am a graduate of the Long Island College Hospital, 1905, and since that time I have been connected with the Brooklyn Eye & Ear Hospital, the Kings County Hospital, the Methodist Episcopal Hospital, the Swedish Hospital, and the Wyckoff Heights Hospital.
Q. In addition to that, doctor, you have had your own office for a good many years?

A. Yes.
Q. How many years?
A. Since 1909.
Q. And your work is entirely confined to eye treatment?
A. Entirely.
Q. Now did you examine this plaintiff, Cain?
A. I did.
Q. When?
A. I made an examination of him on the 2nd of April, 1927.
Q. Will you please tell us what you found his condition to be at that time?
A. I found his right eye was normal, and I found that [fol. 123] his left eye contained a cataract and an increase in intra-ocular tension in that eye called glaucoma.
Q. Glaucoma?
A. Yes, sir.
Q. Doctor, will you tell us what is meant by a cataract, and also its relation to this condition called glaucoma?
A. A cataract is present when the lens in the eye, that is normally transparent, becomes opaque, loses its transparency. The condition of glaucoma is one in which intra-ocular tension becomes increased beyond the normal limit.
Q. Could a cataract be produced by a blow on the eye?

Mr. Wolfe: I object to the question.
The Court: Objection sustained.

Q. What can produce or cause a cataract?
A. One of the causes of cataract is a trauma, or a blow.
Q. A trauma would be a blow?
A. Yes, sir.
Q. Somewhere in the vicinity of the eye?
A. Yes.
Q. Now could you say this, doctor. Getting it down into plain English this means the man is blind in the left eye?
A. I believe he is.
Q. Now you examined him again today, didn't you?
A. Yes, this morning.
Q. Now, doctor, assuming a man 40 years of age, in good health with eyesight normal who did not use glasses, re- [fol. 124] ceives, on February 6th, 1927, a blow on the forehead, around the eye, above it and below it, with a wrench,

such blow being struck by another man standing in front of him, and causing laceration of the scalp, and that he was treated on the vessel by the captain, the eye being bandaged, and pain following, and the flow of blood from the wounds, and that the pain continued with the vision blurred to the extent that when he held one hand over his right eye he could only see large objects, like a man in front of him, and on the second time, the second day after this blow, and on the third day, when he put his hand over his eye he could just see light, and no objects, and on the fourth day after the blow was received he saw nothing but blackness, and has seen no light since that time, there has always been blackness when he closes one eye and tries to look with the other, ever since, and he continued on that vessel from Venezuela to New York, and after a period of eleven days from the time of the blow, he got to the Marine Hospital where he remained for ten or eleven days. That at all times while at the Marine Hospital and up to now, when he covers his right eye blackness is all he can see. On April 2nd when you examined him and you found the condition that you found at that time, can you state in your opinion with reasonable certainty whether the blow could have been a competent producing cause of the condition of the plaintiff's eye on the day that you examined him?

[fol. 125] Mr. Wolfe: I object to this question on the ground that it includes in the supposition a fact which is not a part of the testimony in this case. There is no testimony about seeing something on the third day or the fourth day.

The Court: I understood him to testify.

By Mr. Cuff:

Q. Did you assume this?

The Court: Leaving that out.

Q. About four or five days after the accident when he put his hand over his right eye he had nothing but blackness before him, and ever since. Assuming that instead these daily occurrences, could that condition have been produced by a blow?

A. In my opinion, it could.

Q. Now, doctor, from your examination of this man on April 2nd, and again today, will you state whether he will ever have sight in that eye?

A. I don't believe he will.

Mr. Cuff: That is all.

Cross-examination.

By Mr. Wolfe:

Q. Doctor, were there any facts that you took into consideration answering the hypothetical question, which did not appear in the question itself?

A. I don't know that I just understand you?

[fol. 126] Q. Did you make your answer to the hypothetical question depending solely on the facts stated in the question?

A. Yes.

Q. You didn't take into consideration anything else?

A. No.

Q. Did you assume in making your answer, that the capsule of the lens was obstructed?

Mr. Cuff: Excuse me just a minute. There was one question I forgot to ask the doctor.

By Mr. Cuff:

Q. Doctor, I omitted to ask you when you made the examination of the man on the 2nd of April, 1927, to tell the jury just what you found the condition to be of his eye?

A. I found that the eye contained a cataract. I found that the tension was increased; and there were a number of blood vessels in the iris of the eye, indicating an inflammatory process. The pupil of the eye was larger, it did not react to light as it normally should.

Q. And in respect to the eyebrow, or under the eyebrow, did you notice anything?

A. It had a laceration, a scar, above the eyebrow, a scar on the cheek bone below the left eye, on the left side.

Q. On the left eye?

A. On the left side.

Q. As a physician, doctor, can you determine when a scar is recent and when a scar is not?

A. Only from the fact that a recent scar is of a redish color and later on it becomes white.

Q. What color were these scars?

A. Redish.

[fol. 127] Q. Which would indicate they were recent?

A. Which would indicate that they were recent, yes.

Q. In your opinion, would you say, doctor, those scars may have resulted from a blow inflicted upon February 6th, or prior?

A. I should say so.

Mr. Cuff: That is all.

By Mr. Wolfe:

Q. Doctor, did you take into consideration when making your answer to that question, that hypothetical question, any possibility of the capsule of the lens having a rupture?

A. Not necessarily, no.

Q. Did you?

A. No.

Q. Will you describe for us, doctor, exactly what happens when a cataract forms?

A. The lens fibres become opaque whereas originally they are transparent.

Q. Now is the lens composed of an aqueous material?

A. No, except that all organic materials contain a certain amount of water.

Q. What is the chemical process that occurs when an ordinary lens becomes opaque?

A. I don't know the chemistry of it.

Q. Well, has the eye any fluid in it, the eye ball?

A. Yes.

Q. And does the two fluids, the vitreous and aqueous, are they the two fluids?

A. Yes, sir.

Q. Now does the formation of a cataract require the entry into the lens of either of those two fluids?

[fol. 128] A. It requires the entry of water into the lens.

Q. Now is the lens itself watertight, if I may use that phrase?

A. Yes.

Q. Will you explain to me, doctor, how the aqueous and vitreous fluids in the eye can penetrate this watertight lens without a rupture?

A. Yes, because under certain conditions the resisting power of the capsule to the entry of water can be reduced.

Q. What is the lens composed of?

A. Of a homeogeneous fibre.

Q. Is it membrane?

A. The lens itself is not.

Q. I am talking of the capsule?

A. Yes, that is membrane.

Q. And is it waterproof?

A. Under normal conditions it is.

Q. Well, yet you say being waterproof and without any puncture or rupture the fluid of the eye can pass through?

A. Not under normal conditions.

Q. Under what conditions?

A. Under any condition which will impair the nutrition of the lens.

Q. Is that something that takes time?

A. Ordinarily, yes.

Q. How long would it take to impair the nutrition of capsule to such a point?

A. Well it might occur within a day or two.

Q. That is, there would be sufficient lack of nutrition within one day or two?

A. I think so.

Q. Well, just exactly what happens to a capsule, by reason of lack of nutrition?

A. The capsule would participate in the cloudy process, [fol. 129] and it itself would become cloudy.

Q. Yes, but what happens to the lens?

A. The lens become swollen and opaque, lost transparency.

Q. And what causes that, doctor?

A. The absorption of water.

Q. When you say that this water comes through a waterproof covering of the lens, in other words through the capsule?

A. Yes, but of course when that happens, the capsule is no longer waterproof.

Q. Then you did take into consideration some effect on the capsule of the lens when you answered that hypothetical question?

A. Yes.

Q. In other words you took into consideration the fact that there can possibly be a puncture or a rupture of the capsule of the lens?

A. Quite possibly.

Q. And if there were no punctures of the lens, would you change your testimony?

A. Not at all.

Q. It would still be the same?

A. It would still be the same, yes.

Q. Is this condition called glaucoma permanent?

A. Are you referring to this particular case?

Q. Yes.

A. I can only say that when I saw him this morning and examined him he still had it.

Q. Well, is the condition of swelling, is that permanent?

A. Not necessarily, the lens. As the cataract ages it may shrink.

Q. Has the cataract in the plaintiff's eye started to shrink, in other words is it smaller now than it was on the [fol. 130] 2nd of April?

A. I don't know.

Q. Can you state whether there was an injury to the optic nerve?

A. I don't know.

Q. What is the general appearance or development of a non-traumatic cataract?

A. That all depends. It may occur within a very short time or may take ten or twelve years.

Q. And a traumatic cataract may develop within what period of time?

A. Within twenty-four hours.

Q. Have you ever seen a case of traumatic cataract which developed in twenty-four hours?

A. Yes.

Q. Do you remember testifying at the last trial that you saw one within twenty-four hours?

A. Yes.

Q. What are the external conditions, by which the physical external inferences between a traumatic cataract and non-traumatic cataract may be distinguished?

A. Practically no differences. That is assuming that each cataract is fully developed.

Q. Is there any difference at all?

A. No difference that can be made out, unless the rupture can be made out in the capsule.

Q. Can you state whether a capsule in the lens of Mr. Cain's eye is ruptured or not?

A. I don't know.

Q. Is there any sign of any, or any effect which you can point to that lens to the conclusion that Mr. Cain is suffering from a traumatic, as distinguished from a non-traumatic cataract?

A. Nothing in the visible appearance of the eye.

[fol. 131] Q. You say yes.

A. No.

Q. Well, from the appearance of the lens itself, can you state whether he is suffering from a traumatic or a non-traumatic cataract?

A. No.

Q. When a cataract first starts, speaking now of a non-traumatic cataract, what are the first symptoms that the person feels?

A. The first symptoms that the person would be conscious of would be loss of vision.

Q. Would that be total or partial?

A. Partial.

Q. Would that occur in the center of the lens or on the outside?

A. It would depend upon the location of the opacity.

Q. Well, does it start on the inside and work out, or does it start around the edges and work in?

A. Well, some begin in the periphery and some in the center.

Q. What is the usual treatment for cataracts?

A. Simply its removal.

Q. And if the periphery is not injured, the removal of the cataract permits the patient to see, is that right?

A. Assuming that other elements in the eye are all in a normal condition, yes.

Q. Well, a senile cataract is a common thing?

A. Yes.

Q. And commonly operated on too, isn't it?

A. Yes.

Q. And the operation is commonly successful?

A. Yes.

Q. And you can state definitely that this is not a senile cataract?

A. In my opinion it is not.

[fol. 132] Q. Or I perhaps should say a non-traumatic cataract?

A. I can't say so positively.

Q. You can't say positively that it is not?

A. No.

Q. Did you make any tests, doctor, on the plaintiff to ascertain whether he has light perception?

A. Yes.

Q. Was that test conclusive in your mind?

A. Yes.

Q. What test did you make?

A. I threw the light on the eye after having it shaded, focused upon the light.

Q. You got no reaction?

A. No.

Q. Are there any diseases that cause that condition?

A. Yes.

Q. When the patient can see the eye there are many diseases that cause the condition where there is no reaction to light?

A. You mean when the eye is capable of receiving light.

Q. Yes.

A. Yes.

Q. Did you test it for those conditions?

A. Only as I observed the eye. I made no pathological test.

Q. You made no pathological test?

A. No.

Q. You state that you thought that the plaintiff would be permanently incapacitated, or never have light perception in his left eye?

A. I believe so.

Q. At the same time you state that a traumatic cataract may be removed by an operation?

A. Yes.

The Court: A traumatic cataract?

The Witness: It may be.

[fol. 133] Q. This swelling on the eye is a glaucoma?

A. It is an increase in the glaucoma.

Q. In the intra-ocular tension on April 2nd?

A. Yes.

Q. How long did that condition continue?

A. He still had it this morning.

Q. And that is due to what?

A. It may be due to an increase in the bulk, the contents of the eye.

Q. And that in turn would do what?

A. That would cause an extensive intra-ocular hemorrhage.

Q. Did he have that?

A. Which?

Q. This extensive intra-ocular hemorrhage?

A. I can't say. I could not see the interior of the eye.

Q. You don't know whether he had that or not?

A. No.

Q. Is this caused by swelling of the lens itself?

A. It may be.

Q. Do you recall stating at the last trial, that that is one of the causes?

A. Yes.

Q. In a swelling the substance intra-ocular tension always persists, doesn't it?

A. No, not if there are punctures present.

Q. Such as what?

A. Hemorrhage.

Q. You don't know about that?

A. No.

Q. Did you observe such a condition in the plaintiff?

A. That is not possible to observation.

Q. Well, what else?

A. Those are the only points.

Q. Would the removal of the lens cause the subsidence of the intra-ocular tension?

A. Not if the drainage was permanently impaired.

[fol. 134] Q. That is something you don't know about?

A. That I don't know about.

Q. The right eye is normal?

A. Yes.

Q. He can see out of that just as well as he ever could?

A. Well, he now requires glasses to make his vision normal.

Redirect examination.

By Mr. Cuff:

Q. The right eye isn't normal today, is it, doctor?

A. Organically, it is normal.

Q. I mean for the purpose of sight?

A. No, it is abnormal only in the sense that it has a refractive error. He has farsightedness and has astigmatism.

Q. Does that mean he has to wear glasses?

A. In order to obtain normal vision, yes.

Q. Now doctor, what is your opinion as to opaque cataract. Is it traumatic or non-traumatic?

A. In my opinion it is traumatic.

Q. Now doctor, with respect to the examination made of Mr. Cain on February 28th?

A. February 28th?

Q. Not by you. February 28th, 1927, the doctor who made that examination states this. "I found that he had chronic inflammatory process in the left eye." Will you state in your experience if an inflammatory condition of the eye, whether certain deposits are formed?

A. Yes.

Q. Well what are these deposits?

A. They are little particles which collect on the posteria of the cornea.

Q. Do you call them precipitates?

A. Yes.

[fol. 135] Q. What color are they at first, doctor?

A. They are of a grayish color.

Q. And what change of color do the deposits subsequently undergo?

A. If they remain long enough they are apt to take on a brownish tint.

Q. Now how short a time after a blow such as you have assumed in your testimony was received, would such deposits appear?

A. They might occur in a day or two.

Q. Now in how short a time after that would those deposits change color?

A. That could happen in ten days or two weeks' time.

Q. Now doctor, assuming all that I ask you; that Cain was taken to a hospital eleven days after the blow was received that he was examined by a doctor and that that physician who made that examination found Cain's eye was not inflated but there then was present in his eye deposits, and that the color of those deposits were brown. Would that change your opinion that the blows received by Cain on the 6th day of February, would be a competent producing cause as to the condition of his eye which you found it to be in on April 2nd, 1927. Would that change your opinion?

A. No, it would not.

Q. Now assuming as before, that these deposits were found in Cain's eye on February 26th, would their presence on that day indicate or establish that the plaintiff's eye was diseased or abnormal prior to February 6th, 1927?

A. Not necessarily, no.

Q. How do these precipitates form in the eye?

[fol. 136] A. As a result of the inflammation process.

Q. An inflammation follows a blow, doesn't it?

A. It may.

Q. Now, these deposits eventually disappear, don't they?

A. Yes, as a rule.

Q. Doctor, to have a cataract form on the eye from a blow, does the eyeball itself have to come in contact with the weapon?

A. No.

Q. You also agree with this, Duke's Third Edition, "It is also a fact that a cataract is caused by simply a concussion without opening the capsule." Do you agree with that, doctor?

A. I do.

Q. Now, if Dr. Perlman testified that a concussion of itself cannot cause a cataract, would that change your opinion about that subject?

A. No, sir.

Q. Would you still stand by the text book and your wealth of experience?

A. Yes, sir.

Q. You would?

A. Yes, sir.

Q. Now reading again, doctor, from the same volume, page 454, I ask you if you agree with this statement: "The cause of a traumatic cataract is unfatal. When either inflammation of the intra-ocular tension is assisted with the process. Inflammation is for the most part like the cataract itself to be regarded as a practical consequence of a traumatism by which the membranes of the eye either suffers severe mechanical injury or undergo infection." Do you agree with that, doctor?

A. I do.

Q. Doctor, when you examined Mr. Cain on April 2nd, 1927, was the right eye, the good eye, in the same condition [fol. 137] as you found it today?

A. Organically, yes.

Q. I mean so far as being able to use it?

A. Yes.

Q. Practically the same?

A. Yes.

Q. Practically the same?

A. Yes.

Mr. Cuff: That is all.

Recross-examination.

By Mr. Wolfe:

Q. Doctor, what is uvietis?

A. What is that?

Q. Perhaps you will have to correct me on my pronunciation, uvietis?

A. Uvietis is an inflammation of the uvieal tract.

Q. It is inflammation of the uvieal tract?

A. Yes. It is composed of three structures. The iris, the Ciliary body, and Choroid. Inflammation of any of those structures can be called uvietis.

Q. Did Cain have uvietis when you examined him?

A. He had evidence of having had uvietis.

Q. Is that a traumatic condition?

A. It may be a result of one.

Q. Were you able to tell at the time of your examination whether the uvietis which he showed evidence of having had was of long standing?

A. There is no possibility from an inspection alone to tell the period of time it shall have been.

Q. If Dr. Perlman of the Marine Hospital testified that when he examined him on February 26th, 1927, he was suffering from uvietis would that change your opinion any?

A. No.

[fol. 138] Q. Doctor, would it be possible that he had been suffering from uvietis on February 26th, 1927, and not show signs of it?

The Court: As I understand it, he had something which indicated that he had had it.

Mr. Wolfe: I guess that is right, your Honor.

Q. Well, in your opinion, did the condition, which you found or would the condition that you found on April 2nd been the result of uvietis as well as February 26th, 1927?

A. Yes, it could.

Q. What are the causes of uvietis?

A. One of the causes is traumatism. The other causes are various types of infection.

Q. Tuberculosis?

A. Yes.

Q. Any infection?

A. Yes.

Q. Do you know Dr. Collins?

A. Yes.

Q. Is he an authority on the eye?

A. Dr. Collins has a very good reputation.

Q. Doctor, do you agree with this statement: "That it is impossible for a cataract to form from a trauma of the lens?"

A. I do not agree with that.

Q. Isn't it a fact, doctor, let us say the approximate cause of a formation of a cataract is shutting off the nourishment of the lens?

A. No.

Q. Well, I understood you to say, if I am wrong please correct me, that a traumatic cataract can form in twenty-four hours without a rupture of the lens because the capsule [fol. 139] would become undernourished and allow the aqueous and vitreous fluid to permeate into the capsule?

A. I don't know that I used the term undernourished. Some change took place in it which impaired its water resisting power.

Q. And that change would be caused by what?

A. Well, the most probable cause for that would be something which interfered with the circulation, and which would cause impaired nutrition.

Q. You use that in the same sense as I used nourishment, is that right?

A. Yes.

Q. So the real cause is malnutrition?

A. Yes.

Q. Provided there is no rupture?

A. Yes.

Q. What is it that carries the nutrition to the capsule of the lens?

A. It gets its nourishment entirely from the surrounding fluids, the aqueous and vitreous.

Q. You mean, doctor, that it does not get its nourishment lymph?

A. Yes, from the lymph flowing in the eye.

Q. Is lymph the same as the aqueous fluid on the eye?

A. No, but the same as vitreous.

Q. So it doesn't get its nourishment from the aqueous fluid?

A. I could not say that positively.

Q. Did you agree with this statement of Dr. Collins: "The lens must become opaque in order to produce a cataract?"

A. Yes.

Q. And with this statement: "Now we know that the interference with circulation, that is if the circulation is cut off, then you may have cataracts?"

A. Yes.

[fol. 140] Q. If there is a rupture in the capsule in the back, that is if the vitreous fluid enters the lens, that produces a cataract. The two substances must come in contact, the aqueous and vitreous, must come in contact in order to produce the opacity of the lens? Do you agree with that?

A. Yes.

Q. Do you agree with this. Doctor Collins was asked if he was of the opinion that a ruptures in the lymph vessels in the lens would produce a cataract and his answer was, provided every one of the lymph vessels were ruptured. That might do it Do you agree with that?

A. Will you read that question again, please?

Mr. Cuff: Read all of the answer, Mr. Wolfe.

Q. He asked you if the rupture of the lymph vessels in the lens would produce cataracts and his answer was, provided every one of the lymph vessels were ruptured, that might do it, but you must remember that there are thousands of vessels, and the circulation goes on if there are only a very few left. Do you agree with that statement, doctor?

A. No, because I do not thoroughly understand it.

Q. Well, it is your understanding, doctor, isn't it, or maybe this is not your opinion, but isn't the lens nourished by the lymph vessels?

A. Yes.

Q. And the lymph vessels are not in the aqueous or vitreous fluid but in the lens itself, is that right?

A. Yes.

Q. And a capsule of the lens is nourished by the lymph [fol. 141] vessels?

A. Yes.

Q. Well, undernourishment is the cause of the lens becoming in such a condition that it allows either the aqueous or the vitreous fluid to permeate?

A. If it pertains to the capsule.

Q. Now, then, in order to have the undernourishment of capsules what percentage of the lymph vessels would have to be ruptured?

A. Which lymph vessels are you referring to?

Q. The lymph vessels of the capsule?

A. I don't know that that question is possible to answer. I cannot answer it.

Q. Well, can you put it this way, a large percentage or small percentage?

A. I should say the disturbance would have to amount to considerable, a very considerable disturbance.

Q. Now then that is the only thing which might cause a rupture where there is no rupture of the capsule?

A. The impairment of the resisting power.

Q. Well undernourishment, which in turn is due to a rupture of the lymph vessels, is that right?

A. Yes, you can put it that way.

Q. How severe a blow would it require to rupture the lymph vessels in the lens or in the capsule?

A. It would require rather a severe blow.

Q. Very severe?

A. Rather a severe blow.

Q. And if it was severe enough to rupture the lymph vessels in the capsules, the chances are that it would rupture the capsule itself?

A. It most probably would.

Mr. Wolfe: That is all.

[fol. 142] By Mr. Cuff:

Q. Doctor, after all this discussion, you can't tell whether the capsule of Cain's eye was ruptured or not, can you?

A. I don't know.

Q. It may have been and it — not have been?

A. Yes.

Mr. Cuff: That is all.

Dr. William T. Powers, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cuff:

Q. Doctor, are you a licensed physician in the State of New York?

A. I am.

Q. And how long have you been such?

A. Since 1902.

Q. And what institutions of medicines are you a graduate of?

A. Detroit College of Medicine.

Q. Well what institutions have you been connected with?

A. The St. Johns Long Island City Hospital, New York Eye & Ear Infirmary, the New York Post Graduate Medical School and Hospital, the University & Bellevue Hospital and Medical College, and the New York Polyclinic Hospital, and——

Q. That is enough, doctor. You have specialized in the treatment of eyes, have you?

A. Yes, sir, I have.

[fol. 143] Q. And did you examine this plaintiff Robert Cain?

A. I did.

Q. Did you make a memoranda of that examination, what you found?

A. I did, yes.

Q. Well, will you state what you found when you made the examination?

A. I examined him on May 7th, 1928, at my office, and I found that he had scars above and below the left eye and that he had a cataract on the left eye.

Q. And what did you find about the vision in the left eye?

A. None. Not even light perception.

Q. That means blindness, doesn't it?

A. Yes, it does.

Q. Well, based upon your examination, doctor, will this plaintiff ever have any sight in that eye?

A. In my opinion, he will not.

Q. Well, in your opinion, doctor, would you say that the condition that you found there could be caused by a blow?

A. In my opinion it could, yes.

Q. And this blow would be a competent producing cause of that condition, if struck on February 6th, 1927?

A. Yes.

Mr. Cuff: That is all.

Cross-examination.

By Mr. Wolfe:

Q. Are you able to testify, doctor, that is, can you distinguish the difference between a traumatic and a non-
[fol. 144] traumatic cataract, from the appearance of the cataract?

A. In a mature cataract, no.

Q. In any cataract?

A. In a recent traumatic cataract one may be able to.

Q. Well, from the condition of the cataract itself?

A. Yes.

Q. What is the distinguished mark?

A. Well, the location of the opacity and its appearance.

Q. Well, let us take up the location first. What is the difference of location of opacity upon a recent traumatic cataract and non-traumatic?

A. The only difference is this, that in a recent traumatic cataract the opacity may be located in any portion of the lens, whereas in a non-traumatic cataract it is either in the circumference of the lens or in the center of the lens, or radiating from either.

Q. Were you sitting here in court and did you hear Dr. Bishop testify?

A. Yes, I heard some of his testimony.

Q. Did you hear him state that there was no general rule as to where opacity started in non-traumatic cataract?

A. I did.

Q. And do you agree with him?

A. I am not disagreeing with him. These are the various places where it starts, but there is no rule that it should start in any one of these places.

Q. Any other difference, doctor?

A. No, I think not.

Q. Are you certain of that?

A. Yes.

Q. Positive?

A. I think so.

Q. Doctor, do you recall testifying at the last trial of this action as follows:

"Q. Just describe the difference between a traumatic cataract and a non-traumatic cataract where there are no

[fol. 145] external evidences of injury, and the answer was, "In some kinds of traumatic cataracts you can distinguish if there has been a rupture, and practically from that we decide if it is a traumatic cataract." Now I understood that you have testified that there are other differences?

A. In addition to evidences of a rupture of the capsule, yes.

Q. Now, I just asked you whether there was any distinguishing marks between a traumatic and a non-traumatic, other than the difference in the location of the opacity of the lens, didn't I, and you said, "No, there are no others." Now, what has led you to change your opinion?

A. There is no change of opinion. You asked me about the location of the opacity itself, and that I answered.

Q. I don't want to mislead you, doctor.

A. I was answering you, in taking into view the presence of a cataract the lens, that is the lens alone, and not a ruptured capsule, or any other structure that might be in there.

Q. Is it possible to ascertain from an external examination or any examination whether the capsule of the lens is ruptured?

A. Sometimes it is.

Q. Under what circumstances?

A. Where the rupture is split right through the middle, and where the edges are peeled back.

Q. Did you hear Dr. Bishop testify with regard to the impossibility of locating and ascertaining whether a capsule was ruptured or not?

A. As I understood it was in this particular case in his examination of it.

Q. Do you agree with that in this case?

[fol. 146] A. I do.

Q. Then in this particular case will you please tell us whether you are able to state definitely whether a cataract was traumatic or non-traumatic?

A. In my opinion it is traumatic.

Q. And from an examination of the eye itself are there any signs by which you can tell?

A. Do you mean the objective examination of the eye alone without the history?

Q. Yes.

A. No.

Q. Now, if he has a traumatic cataract which you have testified to, could it have been caused by a blow from a wrench?

A. Yes.

Q. Any sharp object by which there was a concussion?

A. Yes, and it need not be sharp.

Q. Is it possible to have a traumatic cataract without a rupture of the capsule of the lens?

A. Yes.

Q. You heard Dr. Bishop testify about that, did you?

A. Yes.

Q. Do you agree with him?

A. Yes.

Q. As far as the testimony goes, is this the correct statement. The only way that a cataract can form without a rupture of the capsule of the lens is for either the vitreous or the aqueous fluid to permeate the capsule and get inside the lens?

A. No, with a rupture of the lymph vessels, yes.

Q. Yes. Now approximately let us say the cause of the condition of the lens of a capsule which would allow these fluids to permeate it is undernourishment, is that correct?

A. To permeate it without a rupture, yes.

Q. And the undernourishment can only occur by virtue of a rupture of the lymph vessels in the capsule, is that [fol. 147] correct?

A. Not alone, no. I think an injury to the vessel body and the uvietary tract might result in cutting off nourishment.

Q. Did you find any evidence of such a condition in Cain's case?

A. No.

Q. Well, let us confine it to his case. In his case, the only cause for the condition that the capsule and the lens which would allow the fluids to permeate it in the absence of a rupture or capsule itself, would be undernourishment, is that right?

A. Permeating the capsule, yes.

Q. Or caused by a rupture of the lymph vessel in the capsule?

A. Yes.

Q. If the blow was strong enough or severe enough to rupture the lymph vessels, then will you state whether in

your opinion it would also rupture the capsules of the lens itself?

A. Not necessarily.

Q. In other words the blood vessels being protected by the capsule are not as strong as the capsule itself?

A. There are no blood vessels practically.

Q. I mean lymph vessels?

A. I would not say that.

Q. Did you see any evidence that Cain's eyeball was struck?

A. I believe, no.

Q. Were there any scars on the eyeball?

A. No, none that I saw.

Q. And can you have a rupture of the capsule without a direct blow to the eyeball?

A. Yes.

Q. On the last trial, do you recall testifying as follows: "In order for them to enter into the lens", Referring now [fol. 148] to the two fluids. "The capsule of the lens had to be ruptured". And your answer was "For either of them to enter, yes." Do you recall that question and answer, doctor?

A. Well, no, I cannot recall the testimony that I gave last time in detail.

Q. Well, if you made that answer on the first trial, what is it that caused you to change your opinion between then and now?

A. I don't think that I have had any change of opinion. It may have been something in the form of the question that may make it sound different.

Q. The preceding question to that was on the last trial. "You asked me what fluids." That was what you said and then the question came a little later on. "Q. I will come to that later, I am not talking about the aqueous and vitreous, of which you spoke." And then doctor, your answer was. "The capsule of the lens would have to be ruptured." No, doctor, excuse me, that was my question to you at that time and your answer was, "For either of them to enter, yes." Doctor, what caused you to change your opinion?

A. I have not changed my opinion but under the stress of examination I may have overlooked something.

Q. Well, which is correct?

A. What I say now, that the membrane may be permeated if its nutrition is lowered.

Q. Was there any evidence of an injury to optic nerves that you found?

A. I could not see the optic nerves because the cataract obstructed the view.

Q. Then you found no injury to it?

A. Only as to lack of light perspective.

[fol. 149] Q. Is that due to the cataract?

A. To some degree, at any rate.

Q. A common treatment for cataract is removal, isn't it?

A. Yes, if any treatment.

Q. What is uveitis?

A. Inflammation of the uveitary tract.

Q. Did you find any evidence that Cain had it at the time you examined him?

A. No, I can't say whether he did or not.

Q. Was there any evidence?

A. No.

Q. When did you examine him?

A. May 7th, 1928.

Q. Did you examine him since then?

A. No.

Mr. Wolfe: That is all.

By Mr. Cuff:

Q. Doctor, you would not recommend an operation in this case?

A. In this case, no.

Mr. Cuff: That is all.

Mr. Wolfe: That is all.

JAMES B. STEWART, called as a witness on behalf of the plaintiff, being duly sworn testified as follows:

Direct examination.

By Mr. Cuff:

Q. Mr. Stewart, where do you live?

A. Miami, Florida.

Q. And have you a father and mother?

A. Yes.

[fol. 150] Q. And do you live with your father and mother?

A. Yes.

Q. And were you a member of the crew of the Steamship Alpha on that trip?

A. Yes.

Q. When Cain was hurt?

A. Yes.

Q. What position did you have on the boat?

A. Ordinary seaman.

Q. Do you know Jackson, the second engineer?

A. Yes.

Q. You know him, don't you?

A. Yes, sir.

Q. And do you recall the night that Cain was hurt?

A. Yes.

Q. Where were you on the boat at about one o'clock in the morning of February 6th?

A. I was sitting on the corner of the hatch, on the starboard side of the boat.

Q. Aft or forward?

A. Aft.

Q. Tell us what you saw?

A. Well, as I was sitting on the corner of the hatch I saw Cain come around the corner aft of the deck house, the engine room, and I looked up and I saw he was running. His face and shirt was covered with blood, and a few moments, right behind him, came Jackson, the second assistant. Jackson had in his hand a monkey wrench and a flash light in each hand.

The Court: You mean one in one hand and one in the other, don't you?

The Witness: Yes.

Q. Go ahead.

A. The flashlight in the right hand and the monkey wrench in the left hand and as Cain went by me I hollered to him, "What is the matter?" And he did not answer, [fol. 151] and just at that moment Jackson popped up around the corner and said, "Stop him." I said, "What

is the matter with him?'' He said, ''I will teach him to down on watch.'' And he was cursing him, using curse words.

Q. Using curse words, cursing at him?

A. Yes, sir, he was cursing him, and then about that time Cain fell down over the steamline about half way to the deck.

Q. Well, let us get this picture a little better. You were sitting right at the stern of the vessel where the deckhouse went around in a sort of circular form?

A. Yes.

Q. And Cain came around from the portside to the starboard side, where you were?

A. Yes, sir, that is right.

Q. And you saw Cain before you saw Jackson, did you?

A. Yes, sir.

Q. And you saw Cain, and there was blood on his face at that time?

A. Yes, and on his shirt.

Q. Was Cain going fast or slow?

A. Very fast.

Q. Was he drunk?

A. He was not, because a man running that fast could not be drunk.

Q. He was going very fast?

A. Yes, sir.

Q. Then he passed you, did he?

A. Yes, sir.

Q. And then Jackson came into sight?

A. Yes, sir.

Q. And you saw Jackson running, did you?

A. Jackson was not running very fast.

Q. And Jackson came up past you, and Cain had gone on ahead, along the starboard side, forward, and it was at [fol. 152] that time Mr. Jackson made this statement when he cursed Cain?

A. Yes.

Q. Now up forward, is that where Cain fell?

A. It was forward, I guess it was.

Q. Forward of where you were?

A. Yes.

Q. About what part of the ship would you say?

A. Near the center.

Q. And was it as Cain described here, steam casing, or was it near it?

A. Yes, it was near that.

Q. What happened next, Mr. Stewart?

A. Well, then I sat there a moment to try to get an explanation of what happened, and I did not get it so I decided I would go and look for it myself. At that moment Cain disappeared around the amidship deckhouse.

Q. By disappear you mean he went through some door, do you?

A. Yes.

Q. By the way, were there lights on the deck?

A. Yes, it was lighted.

Q. Lights on the dock also?

A. Yes, sir.

Q. You could see plainly?

A. Yes, sir.

Q. You say Cain disappeared from you?

A. Yes, and then I got up and went forward to see if I could find it. I went down into our quarters.

The Court: Where was Jackson?

The Witness: I don't know where he went.

Q. He passed you?

A. I don't remember where he went.

Q. There are a number of doors on both sides of the deck?

A. Yes, sir, there is a place to go down to the oilers' [fol. 153] quarters, and it is possible that he went down there.

Q. You don't know which door he went into?

A. Yes.

Q. All right.

A. Well, then I went forward,.down in our own quarters forward, the forward part of the ship, and I looked around down in the mess room and the sailors' quarters and the firemen's quarters, and I could not see him, so then I was walking back up on the deck, the porthole of the salon was open, and I looked in and I saw a number of people standing around him, and then I went in there, and there was the captain, Cain, Jackson, the first assistant, and a couple

of sailors. I don't know whether there were more there or not. I do not remember. But there were a number of persons in the salon.

Q. What was Cain's condition at that time?

A. The captain was cleaning him up and dressing his head at the time that I went in. I stood in there just a little while and the captain ordered all hands out of the salon.

Q. Did you see Cain again after that?

A. I did not see him again that night. That is, not until the next day.

Q. This was February 6th, wasn't it?

A. Yes.

Q. About what time?

A. One o'clock.

Q. And the captain was there and Cain was there and that was the time that Cain got the injury, wasn't it?

A. Yes, sir.

Q. There is no question about that, is there?

A. No.

[fol. 154] Q. No-, on February 5th did you have occasion to see Cain?

A. Yes, sir.

Q. Where was he at that time—I will withdraw that.

Q. At what time did you see him on February 5th?

A. About nine o'clock P. M., he was in his bunk.

Q. Asleep?

A. Yes, sir, he was asleep.

Q. Now about three P. M. did you see the second engineer, Jackson?

A. That is the 5th?

Q. The 5th?

A. Yes, sir.

Q. Where was he?

A. He was on the poop deck, aft.

Q. Was he drunk or sober?

Mr. Wolfe: I object to that.

The Court: When was this?

Mr. Cuff: Three P. M. on the day of the assault. I am bringing it in under the second cause of action. This is the same man that afflicted the injury.

Mr. Wolfe: He has not developed any fact to show whether this man could tell whether Jackson was drunk or not.

Q. Where you close to Jackson?

A. I was not so close, no, sir. I was up amidships talking to the captain; I was talking to him then.

Q. Did you ever see a drunken man before in your life?

A. Yes, sir.

Q. Many of them?

A. Quite a few.

Q. Can you tell a drunken man if you see him?

A. As a rule, if he is not crazy.

Q. When you saw Jackson was he drunk or sober?

[fol. 155] The Court: How did he appear to you to be?

The Witness: He appeared to me to be drunk.

Q. Was there any obstruction between the captain and Jackson?

A. No, sir.

Q. He was right there at the time?

A. Yes, sir. The captain was right on the deck, and I had been helping the chief mate.

Q. That is enough. If he was there he could see it. Now, Mr. Stewart, in the course of your work on the boat, prior to February 6th, did you have occasion to look at Cain's eyes?

A. Yes, sir, I had noticed his eyes.

Q. Did you notice his left eye after February 6th?

A. Yes, sir, I have.

Q. Will you please tell the Court and jury if his eye looked the same as before February 6th, when you worked with him?

A. No, sir.

Q. The left eye looked different, did it?

A. Yes, sir, it did.

Q. Can you say now that Cain's left eye was not the same as it is now?

A. No, sir, it was not the same before February 6th.

Q. On the same day did you see the chief engineer?

A. Yes, sir, on the 5th.

Q. And were you near him?

A. Yes, sir, I was near the chief engineer.

Q. What time was this?

A. That was about—let us see, it was that morning I went ashore. It was around noontime, maybe eleven o'clock.

Q. Did you see him on the boat later?

A. Yes, sir, I was on the boat later and I saw him.

[fol. 156] Q. Yes, what time about?

A. About nine-thirty, I believe it was.

Q. Around nine?

A. Yes.

Q. State whether he appeared to be drunk or sober?

A. The chief was drunk.

Q. Now, Mr. Stewart, on the afternoon of the fifth, did you see some of the officers of this ship ashore, the afternoon or morning?

A. I think it was the morning.

Q. The morning?

A. Yes, sir.

Q. Where did you see them?

A. I saw them in front of a saloon out on the beach there. One of those liquor joints they have there, a little bit of a two-by-four house made by mud and sticks.

Q. What officers were there?

A. The chief engineer, the third officer, the second assistant engineer, they were the officers.

Q. That is Jackson, the second engineer?

A. Yes.

Q. Was any fireman there?

A. There was a fireman there and a messman.

Q. Tell the jury whether they appeared to be drunk or sober?

A. They were drunk, all of them.

Q. Did they have some donkeys?

A. Yes, sir, they had these little donkeys. They were riding them or trying to ride them, in fact. They were on them part of the time and then they were off.

Q. Were they hollering?

A. Having a general good time—singing, yes, sir.

Q. What was the condition of their clothing?

Mr. Wolfe: I object to that.

[fol. 157] The Court: Overruled.

Mr. Wolfe: Exception.

A. Their clothes was dirty and their shirts were torn, all of them.

Q. Did they have coats?

A. Yes, sir, they had coats.

Q. Did you take particular notice of the fireman?

A. Yes, sir, he had a couple of black eyes and his face was all mussed up.

Q. Now, on February 4th, did you see these men when they left the boat?

A. Yes, sir, I did.

Q. Were they dressed in the same way as you saw them on the morning of the 5th?

A. No, sir, when they left they were clean.

Q. Did they have coats and hats?

A. I think a couple of them did, yes, sir.

Q. They were tidy, at any rate?

A. Yes, sir.

Q. Now, with reference to the location of the boat, where were these man when they were standing in front of this saloon?

A. Well, you see that dock down there——

Q. Were they within view of the boat?

A. Yes, sir. At a distance but in view of the boat.

Q. About what distance?

A. Well, I would say 300 yards, more or less.

Q. Now just one more question, Mr. Stewart: When Cain came around the deck house, when you first saw him, was there any blood on his face before he fell?

A. Yes, sir, he was covered with blood.

Q. Before he tripped at all?

A. Yes, sir.

[fol. 158] Q. And he tripped some distance away, did he?

A. Yes, sir, probably twenty-five or thirty feet up the deck from where I was.

Mr. Cuff: That's all.

Cross-examination.

By Mr. Wolfe:

Q. You say that the saloon was 300 yards from the ship?

A. I said more or less.

Q. Which is it, more or less?
A. Well, that is kind of a hard question to answer.

Mr. Cuff: I object to that.
Mr. Wolfe: Very well, I will withdraw the question.

Q. Can you recognize a man at 300 yards?
A. Now, wait a minute. I was right on the beach with them. I said that the boat was 300 yards away, but I was on the beach with them.
Q. And you were an ordinary seaman?
A. Yes, sir.
Q. Were you on watch at night?
A. Yes, sir.
Q. That is an ordinary seaman's duty, isn't it, to stand watch at night?
A. Yes, sir.
Q. From sundown to sunrise?
A. From seven to five in the morning.
Q. When did the boat arrive at Venezuela?
A. Ten o'clock A. M.
Q. You say that the chief engineer and the second engineer and the fireman and so forth, were ashore on the [fol. 159] 4th?
A. The afternoon of the 4th.
Q. Did they go ashore directly from the ship?
A. The ship was anchored in the stream and they went ashore in a rowboat.
Q. What were you doing up at four o'clock in the afternoon?
A. What was I doing up at four o'clock in the afternoon?
Q. You were going to be on duty that night, weren't you?
A. Yes, sir.
Q. That was on the 4th?
A. Yes, sir.
Q. And you saw these officers at ten o'clock in the morning on the 5th?
A. Yes, sir.
Q. Did you go to bed between five o'clock on the night of the 4th and ten o'clock on the morning of the 5th?
A. Well, we got off about ten, and the mate asked me to stay up and help him, because he thought we were going to dock. He says stay up and help me with the lines.

Mr. Wolfe: I move to strike the answer out as not responsive.

The Court: Strike it out.

The Witness: But when we got in he found that we could not get alongside there because there was a couple of boats there before us, and I went to bed about eleven o'clock, and I got up at about two or three.

Q. Then you got up at two or three?

A. Yes.

Q. And stayed up until the next morning at seven o'clock, the morning of the 6th, is that correct?

[fol. 160] A. I don't know that I stayed up all the time. I may have taken a couple of hours' sleep.

Q. Well, is the custom for people on watch at night to sleep on watch?

A. I do not sleep on watch.

Q. Then you didn't sleep at night?

A. No.

Q. And all the sleeping you did was in the daytime?

A. Yes, sir.

Q. And when you say this, that you saw these men ashore on the morning of the 5th, how long had you been ashore?

A. I just came ashore.

Q. How long did you stay ashore?

A. On the 5th until about two o'clock.

Q. In the afternoon?

A. Yes, sir.

Q. Now, between the hours of two to seven did you go to bed?

A. I think I did, yes, sir.

Q. What time was it that you saw Jackson?

A. Three o'clock.

Q. Three?

A. Yes, sir.

Q. Well, if you went to bed at two o'clock how could you see Jackson at three?

A. I said I got back to the boat at two o'clock.

Q. Did you sign a statement in this case, Mr. Stewart?

A. I surely did.

Q. I show you this statement and ask you if this is your signature (handing witness paper)?

A. Yes, sir.
Q. Will you read that statement?

Mr. Cuff: I object. What do you want him to read it for? Do you want him to read it out loud?
[fol. 161] Mr. Wolfe: No, I just want him to read it.

Q. Did you read that statement over before you signed it?
A. Yes, sir.
Q. And this statement was taken on February 6th, 1927, is that about the date?
A. No, the way that I read it was this. There was a man wrote it. He would ask me questions and I would tell him the answers and he would write them down.

The Court: You mean that he would write it first?
The Witness: No.
The Court: He would ask you first, and then you would tell him and he would write it down, what you told him? Is that right?
The Witness: Yes.
The Court: Then you read it over before you signed it?
The Witness: I can't say as to that. I knew what was in it at the time.
The Court: It is written down the way you gave it to him?
The Witness: Yes, sir.

Q. Was the statement correct at the time it was made?
A. It was correct, I guess, so far as—I did not go into details.
Q. Please answer yes or no, if you can.
A. I am afraid that I cannot.

The Court: No, he may answer.

[fol. 162] Mr. Wolfe: Exception.
The Witness: He just asked me those questions and I just told him those answers. That is, what he asked me I did by best to tell him.

Q. Did Jackson say anything to you as he followed Cain around the deck?
A. I believe he said "Stop him".

Q. Now, how close was he to you at that time?

A. Well, as close as the stenographer here is, probably.

The Court: Two or three feet?

The Witness: Yes.

Q. Did you start to run after Cain?

A. I did not get up and run like I was wild or something. I think I ran a little bit.

Q. You ran after him?

The Court: Did you run before Jackson got up to you, or after Jackson had passed you? Which do you mean?

Q. Either time?

A. Well, now, when Cain, as I explained, when Cain went by, Jackson came up in just seconds, but it took long enough for Cain to go over where he had fallen, around the amidship house, and then I started. I was not in any very big hurry.

Q. What was your purpose in following Cain?

A. Well, in my life, I am not used to seeing those things, and it was absolutely mere curiosity.

[fol. 163] Q. You didn't follow because Jackson said "Stop him"?

A. No.

Q. Was the pumpman around there?

A. No, I do not recall.

Q. Anybody else?

A. There was a wiper there, I think.

Q. Where was he?

A. I don't know.

Q. What was his name?

A. You can see it on the record, I don't remember.

Q. Did you say that Jackson followed Cain after he said to you, "Stop him?"

A. No, sir, I did not say that.

Q. Did you go forward with Jackson after Jackson said "Stop him"?

A. Not with Jackson.

Q. Did you go forward with anybody?

A. I do not think so. No, sir, I think I went right by myself. It is possible that someone went up there looking for him the same as me, but I do not recall that.

Q. Did you have a conversation with Cain at any time after the accident with reference to how it happened?

A. Yes, sir.

Q. What did Cain tell you?

A. He told me that Jackson had hit him with a wrench.

Q. Did you say that in the statement which you made?

A. I think I did.

Mr. Wolfe: I offer the statement in evidence.

Mr. Cuff: No objection.

The Court: It may go in.

(The above statement was received and marked Defendant's Exhibit B.)

[fol. 164] Q. You made no mention in the statement that Jackson was drunk, did you?

A. No, sir, I did not.

Q. Now, at the time the statement was made you intended to tell the whole story as far as you knew it, didn't you?

A. Well, it was this way with me. I did not have any interest in the case and I have not got any interest in the case now. I mean, I was just doing what the man asked me to do.

Q. In other words, you were not going to tell him anything that he did not ask you?

A. That's it.

Q. And you were not interested whether he got the whole truth?

A. I told him just what he asked me for I meant to tell him the truth.

Q. Now, in this statement you said "Cain didn't say anything to me about the first assistant striking him." Is that true?

A. No, sir. He did not say anything about the first assistant striking him.

Q. Did you see anybody strike Cain?

A. No, sir.

Q. How far was Jackson behind Cain?

A. Well, eight or ten feet.

Q. And was Jackson running?

A. He was not. Yes, sir, he was running.

Q. I mean when you saw him, was he running?

A. Yes, sir.

Q. Did you talk with Jackson after the accident?

A. No, sir.

Q. You had no conversation at all about it with him?

A. Not that I recall.

Q. Well, is that the best answer you can make, you don't know whether you did or not?

A. I don't know. I do not think that I did. I will not [fol. 165] say that I did or that I did not.

Q. You recall all the facts of the night of February 6th vividly?

A. I think so, yes, sir.

Q. Do you recall if you talked with Jackson that night?

A. What I think I talked with Jackson?

Q. What did you say?

A. What did you say?

Q. Do you recall having talked with Jackson on the night of the accident?

Mr. Cuff: If your Honor please, that is where this whole thing gets mixed up, that is how the plaintiff got mixed up.

The Court: Do you mean the night of the 5th-6th, or the evening of 6th-7th?

Mr. Wolfe: I withdraw the question.

Mr. Cuff: Just a moment. That is the same way that he mixed up the plaintiff.

The Court: The Court is trying to keep this clear.

Mr. Wolfe: May I ask your Honor that Mr. Cuff's remarks be striken from the record.

The Court: Strike them out.

Q. Do you recall having talked with Jackson after one A. M. on the morning of the 6th?

A. No, sir, nothing personal. That is, nothing that I would say pertaining to the case.

Q. Do you deny talking with him on the morning of the 6th after one A. M.

A. That is something that I cannot say. There was a [fol. 166] general mix-up, a man had been hit on the boat—that is, had been hit on the head while on the boat, and everybody was talking about it, and I probably talked to Jackson.

Q. Do you recall asking him whether he hit Cain or not?

A. I do not.

Q. It would make no impression on you, would it, such a conversation?

A. Yes, it would, I expect it would.

Q. You said in your statement: "That same night I asked the second assistant why he struck Mr. Cain, and the second assistant denied having struck Cain, saying Cain had fallen; as a result of the fall had sustained injuries to his head."

A. Yes?

Q. Does that bring any conversation back to your memory?

A. No, it does not.

Q. Well, you read the statement over before you signed it, and you signed it with that in, didn't you?

The Court: The witness did not say that. The witness did not say that he read it over before or after he signed it. He said, the witness answered, that he answered the questions that were put to him.

Mr. Wolfe: If your Honor please, that is not my impression.

The Witness: It is this. No, sir, I never read it, line for line. As I first said——

The Court: Somebody asked you some questions and you gave answers, and they wrote them down, and then after that you signed it. Did you read it before you signed it?

[fol. 167] The Witness: No, sir.

Q. Did you ever read it except when you were shown it on the stand here today?

A. Yes, sir, at the last trial.

Q. What time did the vessel go to dock, on the 4th or 5th?

A. Just a minute now. I will tell you if I can. I think it went up to the dock that night some time.

The Court: You mean of the 4th-5th?

The Witness: The night of the 4th.

The Court: Before midnight?

The Witness: I think so, but I am not exactly clear on that. But I think it was the night of the 4th.

Q. Where were your quarters on that ship?

A. Forward.

Q. And where were Cain's quarters?

A. Forward.

Q. And were your quarters and his in the same portion of the forecastle?

A. No, mine was on the starboard side and his was on the port side.

Q. They were entered by a different companionway?

A. No, there is a ladder going down below the main deck, and you can go either way. There is a messroom in the middle.

Q. Were you friendly with Cain on the voyage?

A. Just the same as sailors are.

[fol. 168] Q. Well, do sailors and firemen fraternize together?

A. If they get their choice, perhaps.

Q. Why did you take pains to look in Cain's eyes?

A. I never took pains, but we played cards together on the messroom table and there is nothing to keep a man from looking in another man's eyes, is there? If a man has got bad eyes, I can usually tell it.

Q. Was your attention particularly directed to looking at his eyes?

A. No, sir. I can tell a blind man almost any time I see him. He was not blind at that time.

Q. Were you present in the salon when the captain ordered Jackson and the first assistant out?

A. Yes, sir, I was among the ones who were ordered out.

Q. Were you present when Cain said to the captain that the first assistant had hit him?

A. No, sir.

Q. Well, were you there when Cain told the captain the second assistant had hit him?

A. No, sir, I don't recall that, either.

Q. What led you to believe that Mr. Jackson was drunk on the afternoon?

A. For the simple reason that a sober man doesn't usually stagger around and sit down on the corner of a hatch when he should be on watch.

Q. So he sat on a hatch corner, did he?

A. He sat down on it. And he staggered around on the poop.

Q. How was he dressed?

A. He was in his working clothes, I think.

Q. Do you know whether the captain saw him?

A. I don't.

[fol. 169] Q. Did you ever have any trouble with Jackson?
A. No, sir. Jackson and myself were friends, practically.
Q. Did you ever have any trouble with the first assistant?
A. No, sir.
Q. Did Jackson have any trouble with any man aboard ship, that you know of?
A. No, sir, not that I know of.
Q. Nor the first assistant either?
A. No.

Mr. Wolfe: That is all.

Redirect examination.

By Mr. Cuff:

Q. Now, Mr. Stewart, so there will be no question at all about your ability to determine the appearance of these men on the street, that you state were drunk, all of them, how near to them were you?
A. Why, I drank with them, to be frank.
Q. You were right in with them, were you?
A. Yes, sir, I was.
Q. Now counsel has told you that this statement was taken on February 6th. It is the date of February 6th. Do you know what date it was taken on?
A. It was not February 6th.
Q. Well, do you know what date?
A. I think about the 15th or the 14th.
Q. Of March?
A. Of March.

The Court: Of March, did you say?
The Witness: Wait a minute. Yes, sir, March. It was [fol. 170] the trip after that one.

Q. So this was taken from you on March 14th. The date that is at the end of that there, on the following trip, wasn't it?
A. Yes, sir.
Q. Although there is some date up here at the top (indicating top of statement), February 6th, 1927?
A. Yes.

Mr. Cuff: May I read this to the jury, your Honor?
The Court: Yes, sir.

(Mr. Cuff reads Defendant's Exhibit B to the jury.)

Q. Now, Mr. Stewart, when you were talking to the man that took that statement from you, did you answer the questions he put to you?
A. Yes, sir.
Q. Did he ask you to volunteer any information?
A. No, sir.
Q. He just asked you the questions and you answered them?
A. Yes, sir.
Q. And then he told you what he put down?
A. Yes, sir.
Q. That is the reason you say you knew what was in the paper?
A. Yes, sir.
Q. Did he put down everything that you told him?
A. I do not think that he did put down everything, because it would possibly fill up a whole book.
Q. What man was it that took that statement from you, do you know?
A. I can't tell you.

[fol. 171] The Court: Gentlemen, at this time we will take a recess until ten-thirty Monday morning, July 30th.

July 30th, 1928, 10:30 A. M.

Trial resumed.

Vine H. Smith, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Cuff:

Q. Mr. Smith, are you an attorney, and admitted to practice law in the State of New York?
A. I am.
Q. How long have you been admitted to practice law in the State of New York?

A. For a little over twenty-four years.

Q. Where do you live?

A. In Brooklyn, 213 Sterling Place.

Q. You are at present an Assistant Corporation Counsel in the City of New York?

A. Yes, sir, I am.

Q. Originally, you were Mr. Cain's attorney before you became Assistant Corporation Counsel, is that right?

A. Yes, that is correct.

Q. I call your attention to the fourth cause of action in the complaint (handing witness the complaint). Now, Mr. Smith, after you became Assistant Corporation Counsel, I [fol. 172] became the attorney for Mr. Cain, didn't I?

A. That is correct.

Q. But you continued to advise me and assist me with respect to the law and the facts in the case?

A. As best I could, yes.

Q. Now, with respect to the fourth cause of action did you plan and prepare, and dictate that cause of action?

A. I did not dictate the actual language that appears here but an earlier draft from which this was taken.

Q. Well, while you were the attorney you simply served the summons?

A. That is all.

Q. And when I came into the action the complaint was served?

A. My recollection is that another action was started.

Q. A new action was started, you are right about that?

A. Yes.

Q. I think you are. I call your attention to the language that was referred to by the attorney for the defendant in the fourth cause of action, as follows: "That the defendants, with full knowledge of the assault by said Jackson upon the plaintiff, as above stated, and with full knowledge of all the circumstances thereof, did, by their agents, servants and employees coerce and intimidate the plaintiff and did compel him by such coercion and intimidation, while the said ship was on the high seas, and while the plaintiff was incapacitated, caused him to sign the statement that the enforced injuries were sustained by a fall while the plaintiff was intoxicated, which said statement is wholly untrue." I asked to tell the Court and jury where you got

[fol. 173] the information from that you put in this fourth cause of action of the complaint?

A. The fact that the plaintiff signed the paper, and the circumstances under which he did sign it, and which I intended to summarize in stating coercion and intimidation, that I got from Cain himself. The contents of the statement I based upon the information which I received from the defendants, Walker & Daly, or from their investigator to whom they referred me.

Q. That is the part of the statement which says: "That the said injury was sustained by a fall while the plaintiff was intoxicated." You say you got that from the defendants, or someone to whom they referred you?

A. Yes.

Q. You didn' get that information from Mr. Cain?

A. No, sir, I did not.

Q. In fact, it was you who told Mr. Cain that that was contained in the alleged statement which he signed?

A. I told him it was what they said.

Q. You told him that?

A. Yes.

Q. Did you ever see the statement?

A. My recollection is that I did not see it; I am not very clear on that.

Q. That you did not?

A. That I did not.

Mr. Cuff: That is all.

Cross-examination.

By Mr. Wolfe:

Q. Mr. Smith, is the language of paragraph sixteen in the complaint your own language?

[fol. 174] A. I don't understand what you mean.

Q. Did you dictate that?

A. Very nearly that. I dictated that in substance.

Q. Did you examine the complaint before it was served?

A. I don't know whether I did or not. If you want to know whether I am responsible for that phrasing, I am.

Q. You don't know whether you examined this complaint before it was served or not, is that it?

A. I do not know, I cannot remember, but I do know that I dictated and read something the substance of which is in this complaint.

Q. You have been practicing law for twenty-four years?

A. I have.

Q. And is it the custom for you to allege that which you do not know is true without mentioning it on information and belief?

A. Well no, that is not the custom, no.

Q. Well, you didn't allege that this was on information and belief, did you?

A. No.

Q. You allege it as a fact?

A. Yes.

Q. Will you give me the name of the man in the defendant's employ who told this information, who gave you this information?

A. I say it was either Walker & Daly and the man to whom they referred me, as their investigator. Whose name I am not sure about; I think it was Shaw.

Q. Did you make any notes of the conversation you had?

A. No. I may have, but if I did I have not got them now.

Q. So that you drew the complaint which you know would be sworn to by the plaintiff which contained the statement [fol. 175] of fact that you did not know was a fact?

A. I did not say that, no.

Q. Is that right?

A. No, that is not right.

Q. Didn't you say that Cain was drunk?

A. I did not.

Q. Didn't he sign the statement that said he was drunk?

A. The defendant told me that. They told me that. I prepared the complaint against them.

Q. You say you never did see the statement?

A. I say that I do not remember whether I saw it or not. I don't remember, but whoever talked to me about it told me what was in it. Whether I read it, that part of it or not, I don't just know what happened. I think that is what happened.

Q. What was that?

A. That they told me about it.

Q. Isn't it rather unusual for an attorney to allege something that he does not know as a fact?

A. I answered that. I said that is my knowledge.

Q. Do you know as a fact whether or not the plaintiff signed the statement that he was drunk?

The Court: You have already received an answer to that.

Mr. Wolfe: I think his own counsel asked him.

The Court: You already asked him that.

Mr. Wolfe: I don't recall asking that question.

The Court: All right, ask it again.

[fol. 176] Q. Do you know it to be a fact that the plaintiff was compelled to sign the statement stating that he was drunk?

The Court: That you did not ask him, the word "Compel."

Q. Do you know whether that is a fact?

A. That fact I got from the plaintiff himself.

Q. That he was compelled to sign the statement that he was drunk?

A. That he was compelled to sign the statement. As I said before what was in that statement I learned from the defendant or their investigators.

Q. Well, you don't know it to be a fact that he was compelled to sign the statement stating that he was drunk?

The Court: Just a minute now.

Mr. Cuff: I submit what difference does it make.

A. Perhaps I had better ask you just what you mean. I have not any evidence that could be introduced here. I said I know these things from reading the papers, and so forth. I know from someone else's knowledge. I do not assume that I had to get a judgment of the Court before I——

Q. You did not state in the complaint that this — someone else's knowledge, did you?

A. I prepared it for the plaintiff to sign.

Q. You did not state it on information and belief, did you?

A. I did not.

Q. Did you know it to be a fact that it was alleged that [fol. 177] the defendant—I withdraw that. Did you know it to be a fact that the plaintiff was compelled to sign the statement that he was drunk and fell down?

A. Did I know that?

Q. Yes.

A. Yes, from the information I had received from the plaintiff, and your client.

Q. That is what you call "Your knowing it"?

A. Yes.

Q. What somebody else told you?

A. Exactly.

By Mr. Cuff:

Q. In all your experience do you know any other way to find out?

A. No.

Q. You didn't happen to be passing down in Venezuela on that date, did you?

A. No.

Q. Or flying along in a flying boat just when that statement was taken?

A. No.

Q. Counsel asked you if you made any notes on this conversation referred to between you and the defendant's counsel or their investigator. And I ask you is that the custom of any lawyer?

A. Not under the circumstances, no.

Q. Well, is that the custom regularly?

A. No.

The Court: How can he tell what the custom of another lawyer is?

Q. Did you make any notes or suggestions?

A. Nothing of importance on a casual conversation as this one.

[fol. 178] Q. Now all the facts that we have, and all the causes of action, came from Cain's lips?

A. They did. That is all the substantial facts on which I based the complaint.

Q. Yes.

A. Yes.

Q. Except these things that are referred to by the steamship company being a foreign corporation?

A. No.

Q. We put that in the pleadings, didn't we?

A. We did.

Q. Now that part of the complaint, this particular cause of action says, that part which says "And fell while intoxicated" you got that from the defendant, did you?

A. Yes.

The Court: That has already been stated.

Mr. Cuff: That is all.

Mr. Wolfe: That is all.

Mr. Cuff: The plaintiff rests.

MOTIONS TO DISMISS

Mr. Wolfe: If your Honor please we move to dismiss the first, second, third, fourth and fifth causes of action——

The Court: The fourth cause of action has been withdrawn.

Mr. Wolfe: All causes of action except the fourth, which was withdrawn. My understanding of the law with respect to the first cause of action, and the second and third causes of action is as follows: The defendant in an assault case is not liable unless the assault was committed with the knowledge and consent of the defendant or its master of the vessel. The testimony in the case thus far is——

[fol. 179] The Court: What about that, Mr. Cuff?

Mr. Wolfe (continuing): Unless the owners employ a notoriously brutal man. Under my understanding of the law, the owner is not liable for any assault committed. Now there is no testimony here on which it seems to me that the defendant can be held. On the plaintiff's own statement of fact. This was nothing more than, what I should call, nothing more or less than a drunken brawl, that is if the facts are accurate.

The Court: I cannot agree with that at all. According to the plaintiff's testimony up to now, the plaintiff was derelict in not being out at the right hour, it being late. His superior officer finding him out late, and not getting a

proper excuse, no excuse that in his judgment was proper for being late, proceeded, as a superior officer, to give him a licking he did not, according to the testimony up to now enter into any private quarrel, but in his capacity as officer by way of chastisement for being derelict in duty. The whole circumstances I hold, is a matter of law if the jury believe the facts.

So if, of course, there are not any contradictions of this evidence, it will be the duty of the jury to find against the defendant in this matter.

Mr. Wolfe: Isn't your Honor drawing certain conclusions [fol. 180] from the evidence which do not appear?

The Court: I am drawing only such conclusions that the jury has a right to draw from the facts, and if the jury draw those conclusions it would be their duty to find accordingly. We cannot hold, as a matter of law that the jury would not have a right to draw these conclusions of facts from the evidence.

Mr. Wolfe: The testimony thus far in my opinion does not seem to indicate a conclusion which your Honor has drawn. Namely, that this was done in the line of duty.

The Court: It is whether the jury is able to find, as a reasonable man would have the right to draw.

Mr. Wolfe: That this assault was committed in line of duty. The testimony thus far indicates that the second assistant was drunk.

The Court: That would make no difference. He is still a superior officer. It would not make a particle of difference.

Mr. Wolfe: Does your Honor know as a matter of law that any superior officer on board a vessel charged with maintaining discipline and punishment.

The Court: I do not say that. I say that this fireman was derelict in his duties, and the company is liable, if in the course of his duty he is assaulted unnecessarily and im- [fol. 181] properly, without justification.

Mr. Wolfe: Without justification you say, your Honor.

The Court: Without justification, yes. The fact that he was late is no justification for doing what has been testified to in this case. Whether or not this was done is for the jury to determine after hearing all the evidence.

I deny your motion and you may have an exception.

Mr. Wolfe: I take an exception, your Honor, thank you.

Now, your Honor, as to the last cause of action, that is the sixth cause of action. That is under the statute prohibiting flogging. Now under the law, and I believe your Honor is familiar with it.

The Court: No.

Mr. Wolfe: Well, your Honor, the law reads as follows: The statute reads that flogging and other forms of corporal punishment are hereby prohibited on board of any vessel, and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officer thereof who should violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, and punishment by two years' imprisonment or not less than three months or more than two years. Whenever any officer other than a master of such vessel shall [fol. 182] violate any provision of this section, it shall be the duty of such master to surrender such officers to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or a complaint thereof has been made within three years after reaching port. Any failure on the part of such master to use diligence to comply herewith, which failure shall result in the escaping of such officer, shall render the master of the vessel or the owner of the vessel, liable to any damages for such flogging or corporal punishment to the person illegally punished by such officer. That is a penal statute.

The Court: Both penal and a court. The first point is penal and the second point gives the right of action in the courts.

Mr. Wolfe: We admit that Jackson was not surrendered to the officer at the completion of the voyage, but that provides that if the failure to surrender shall result in the escape of such officer. Jackson was here in court at the last trial of this action. This liability about which the statute speaks is contingent upon the failure of the master to report him.

The Court: Read that last part again, will you?

Mr. Wolfe: "Any failure on the part of such master to use diligence to comply herewith, which failure shall result [fol. 183] in the escape of such officer, shall render the master of the vessel or the owner of the vessel liable to any

damages for such flogging or corporal punishment to the person illegally punished by such officer."

In other words the whole thing hinges as to whether or not Jackson did or did not escape. The action is contingent upon that, so there is no cause of action, as stated.

Mr. Cuff: If your Honor please the view that we take of this matter is that Jackson was not given up, he was not surrendered, he was not prosecuted, therefore he escaped.

The Court: Let me see the exact language of that statute.

(Mr. Wolfe hands the Court copy of the statute.)

The Court: What did you say escape of such officer means?

Mr. Cuff: We consider that the failure of the captain to surrender the second officer after Cain's complaint was made to him allowed the second engineer to escape. That this is the opposite to——

The Court: Then it is mere failure alone?

Mr. Cuff: But the statute, your Honor, does not say it is mere failure. Any failure on the part of the captain to use due diligence to compel herewith, shall render the mas-
[fol. 184] ter of the vessel or the owner liable. It says——

Mr. Smith advises me that there are several cases that interpret that phrase. And we will be glad to submit that to your Honor if he will reserve decision at the present time.

The Court: Mr. Smith, have you any of the decisions with you?

Mr. Smith: I have not got them here, your Honor.

The Court: This is the place for them.

Mr. Smith: I appreciate what your Honor has said about that thing, but some cases have held that in the absence of any showing of failure to surrender, that that amounts to escape. I can show your Honor that authority, and you can see whether we are right or wrong.

Mr. Wolfe: I have looked through the allegations, and through subsequent cases, and I have found that no other cases that interpret it, but in the last trial Justice Winslow did interpret as your Honor has done, and dismissed the cause of action.

The Court: He dismissed that particular cause of action?

Mr. Cuff: Yes, your Honor, the sixth cause of action was dismissed.

The Court: Well, I will reserve my ruling on it and look it up. I will find against the plaintiff on it but I will reserve decision at this time.

[fol. 185] Nelzer Alden Woodbury, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Mr. Woodbury, what is your occupation?
A. Marine engineer.
Q. What licenses do you hold?
A. Second assistant.
Q. Second assistant?
A. Yes, sir.
Q. Where was that license issued?
A. Boston, Massachusetts.
Q. When?
A. March 24th, 1928.
Q. How long have you been going to sea, Mr. Woodbury?
A. About six years.
Q. Are you at the present time in the employ of either of the defendants in this action?
A. No, sir.
Q. By whom are you employed?
A. By the Erie Railroad Company.
Q. Have you any interest in the outcome of this action one way or another?
A. No, sir, I have not.

Mr. Cuff: I object to that question and I move to strike the answer out.
The Court: The objection is overruled. Motion denied.
Mr. Cuff: Exception.

Q. Were you on board the steamship Alpha in February, 1927?
A. Yes, sir.
Q. In what capacity were you on board?
A. As third assistant engineer.

[fol. 186] Q. As third assistant engineer, what watch did you have?

A. The eight to twelve watch.

Q. Do you recall the date of February 6th, I mean, do you recall the dates of February 5th and 6th, 1927, when the vessel was lying in Venezuela?

A. Yes, sir, I do.

Q. Now, on the morning of February 5th were you on watch?

A. Yes, sir, I was.

Q. What watch did you have?

A. The eight to twelve.

Q. And you served the eight to twelve watch on that day, the 5th?

A. Yes, sir, I did.

Q. Was that in the morning?

A. Yes, sir.

Q. Eight to twelve in the morning, is that right?

A. Yes, sir.

Q. What did you do after you came off watch on February 5th?

A. I had dinner, and after dinner I went ashore with the captain and his wife and the first assistant.

Q. Speak up, will you please, Mr. Woodbury, I don't believe that all the gentlemen of the jury can hear you. You say you went ashore with whom?

A. I went ashore after dinner with the captain, his wife, and the first assistant engineer.

Q. Did the captain have his wife aboard the vessel?

A. Yes, sir.

Q. He did?

A. That is right.

Q. How long did you stay ashore?

A. About two hours.

Q. What time did you return to the vessel?

A. About four o'clock in the afternoon.

Q. And from then on what did you do?

[fol. 187] A. At five o'clock—after that later on in the afternoon, that same afternoon, I went ashore again with the chief engineer.

Q. What time was that you went ashore with the chief engineer?

A. Probably six-thirty or seven, around that time, I do not exactly remember.

Q. This is the evening of the 5th, you mean?

A. Yes, sir.

Q. What is the name of the chief engineer?

A. Mr. Miller.

Q. Is he dead now?

A. Yes, sir, he is.

Q. Well, you were ashore with Mr. Miller, while you were there did you see the plaintiff, Mr. Cain, in this action?

A. Yes, sir, I did.

Q. Will you please tell us where and the circumstances under which you saw him?

A. The chief and I were sitting on the beach talking and the first that I noticed I happened to turn around to talk to the chief and Mr. Cain had his arm around the chief engineer's neck in a strangle hold.

Mr. Cuff: When was this?

The Witness: In the evening of the 5th.

Q. This is the night of the 5th.

A. Yes, sir.

Q. Did Cain come from the rear or from the front?

A. I didn't see him come up.

Q. Well, when you saw him he had his arm around the chief engineer's neck, under the chief's neck, something like this (indicating)?

[fol. 188] A. Yes.

Q. Was it from the back or front?

A. It was in the back with his arm underneath the chief's neck.

Q. And you had occasion to observe intoxicated people?

A. Yes, sir, I had many.

Q. Will you state whether in your opinion what was the condition of the plaintiff at that time?

A. He was quite intoxicated in my opinion.

Q. What did you do when you saw this affair between he and the chief engineer?

A. I asked Mr. Cain what his reason was and his answer was that he poked me in the jaw.

Q. And then what did you do to Cain?

A. I started to retaliate, but there were several of the crew around at the time and let him go.

Q. Now, did you return to the ship that night?
A. Yes, sir, I did.
Q. What time?
A. Very soon after the episode.
Q. Did you stand your eight to twelve watch on that evening of the 5th?
A. No, sir.

Mr. Cuff: I object to that.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. Because Mr. Jackson was working on the boiler and he agreed to call if the ship sailed on that watch.
Q. The ship did intend to sail on the 5th or 6th, didn't it?
A. Yes, sir.
[fol. 189] Q. You expected the ship was going to sail that night?

Mr. Cuff: I object.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. Well——
Q. I asked you if you expected the ship was going to sail that night, late the night of the 5th or the early morning of the 6th, is that right?
A. Yes, sir, that is.
Q. Now, did you subsequently go down in the engine room after the eight to twelve watch?
A. Yes, sir.
Q. Who was down there when you arrived, what time did you get down?
A. As I remember, it was around one o'clock and when I went in the engine room Mr. Pankor was there.
Q. Who is he, the first assistant?
A. Yes, sir, and as I went into the engine room Mr. Jackson came down from above.
Q. Did he have anything in his hand?
A. I don't recall, I do not think so.
Q. Is that the best you can fix the time?
A. I cannot fix the time accurately.
Q. Was it after the stand-by bell had been rung?

A. I do not remember whether the bell had rung or not, but it was after the assault was supposed to have been committed.

The Court: I don't understand what you mean by that.

The Witness: Well, after the accident or happening.

[fol. 190] The Court: Do you know anything about the accident?

The Witness: No, sir.

The Court: I don't quite understand. "After the assault was supposed to have been committed."

Q. Did you have a conversation with Jackson?

A. Yes, sir.:

Q. Did you talk about Cain?

A. Yes, sir.

Mr. Cuff: I object.

The Court: Objection sustained.

Q. What did Jackson tell you about Cain?

The Court: How is that admissible?

Mr. Wolfe: I am just asking how he knew about the assault.

Mr. Cuff: I object, your Honor.

The Court: Sustained.

Mr. Wolfe: Exception.

Q. What was the condition of Mr. Pankor when you arrived in the engine room?

A. He was sober.

Q. Are you positive of that?

A. Yes, sir.

Q. What was the condition of Mr. Jackson?

A. He was sober.

Q. Are you positive of that?

A. Yes, sir.

Q. Do you know what Jackson had been doing on the 5th. Was he working, was he doing any work, and what work, if any?

A. All that I know he was working on the boiler.

[fol. 191] Q. Do you know as a fact that he was working on the boiler?

A. Yes, sir.

Q. Did you see him?

A. Yes, sir.

Q. Did you see him in the afternoon?

A. I was ashore and I do not remember seeing him then.

Q. When was the last time you saw Jackson on the 5th before you went down to the engine room that night?

A. I think when I came back aboard the ship with Mr. Miller.

Q. Then you saw Jackson?

A. Yes, sir.

Q. And what was his condition at that time?

A. Sober.

Q. Did you ever see Jackson drunk?

A. No, sir.

Q. Are you familiar with Jackson's general reputation with respect to his sobriety and temperance?

A. On board ship, yes, sir.

Q. What was his reputation?

A. Sober.

Q. Did you have a talk with Cain after the accident about the accident?

A. No, sir.

Q. What was your condition on the 5th?

A. Sober.

Q. Now can you describe for the benefit of the Court and jury what sort of a place this port was that this ship was in in Venezuela. Is there a dock there?

A. There is a dock that juts out from the beach about nine-tenths of a mile.

Q. Is that an oil loading port?

A. Yes, sir.

Q. And this dock is nine-tenths of a mile from the beach?

A. Yes, sir.

Q. And you were at a dock nine-tenths of a mile from the [fol. 192] beach?

A. Yes, sir.

Q. Loading oil?

A. Yes, sir.

Mr. Wolfe: That is all.

Cross-examination.

By Mr. Cuff:

Q. Now, you knew the chief engineer, Miller, whom as you say, had died?

A. Yes, sir.

Q. Where did you learn that he died?

A. I was on board a ship and I heard in a roundabout way that he had been shot to death.

Q. That he got shot?

A. That is all that I know.

Q. That was the gossip among the men on the ship, wasn't it?

A. Yes, sir.

Q. Now, Miller was your chief, wasn't he?

A. Yes, sir.

Q. Of course, he was Cain's superior too, because Cain was a fireman?

A. Yes, sir.

Q. And Miller lost his job with that ship at the end of this voyage, didn't he?

A. I don't remember the exact time. I think it was that time, yes, I believe it was.

Q. Yes. Did you ever see Miller take a drink?

A. I think so.

Q. Did you ever see the first assistant take a drink?

A. I may have. I cannot recall vividly.

Q. Did you ever see Jackson take a drink?

A. No, sir.

[fol. 193] Q. What do you mean by a drink, or what do you think I mean by a drink?

A. A drink of liquor.

Q. Now, you have narrated the assault—I will withdraw that. You have narrated what you have said is the episode on the beach with respect to Cain and the chief engineer. Was there any reason that you could see that provoked Cain to take a hold around the chief engineer's neck?

A. No, sir, no, sir, no reason that I know of at all.

Q. Were both of you sitting down?

A. Yes, sir.

Q. How far away were you from Miller?

A. About two or three feet, I imagine.

Q. And you both are officers of the ship and both Cain's superiors and you tell us that without any warning at all he came up and started to wrestle with Miller, is that it?

A. That is what happened, yes, sir.

Q. And then you made a poke at Cain and he made a poke back at you, is that it?

A. I made no poke, he poked at me first. I started to retaliate but members of the crew there interfered and I let it go.

The Court: You said Jackson and you meant Cain, didn't you?

Mr. Cuff: That is right, your Honor.

Q. What other members of the crew were present?

A. I do not recall the names. It was dark and I did not pay much attention.

The Court: Did you say dark at six-thirty?

[fol. 194] The Witness: No, sir, it was after dark when this episode happened. I think it was around nine o'clock that evening that it happened. I cannot state the exact time.

Q. Do you realize that you said it was around six-thirty on your direct examination?

A. I went ashore then.

Q. Then is when you said that this thing took place?

The Court: He said he went ashore at six-thirty. About how long after you went ashore was it?

The Witness: About two hours.

The Court: What did you do in those two hours?

The Witness: Well, we went over to the native village and we wandered around there and then we came back.

The Court: Where was the captain and his wife?

The Witness: On board the ship I imagine.

The Court: They went ashore with you?

The Witness: No, sir, not at that night time.

The Court: Who went ashore with you?

The Witness: The chief engineer.

Q. Now, when you went ashore with the captain, you just walked through the native village, is that right?

A. Yes, sir.

[fol. 195] Q. You didn't stop anywhere?

A. No, sir. We looked at the sights but that is about all we did.

Q. You didn't go in any place?

A. No, sir.
Q. Did you have a drink together?
A. No, sir.
Q. Are you absolutely sure about that?
A. Yes, sir, I am.
Q. You passed several saloons, didn't you?
A. Yes, sir.
Q. Now, when was it that you first told anybody about anything you characterized an episode on the beach?
A. It was in Boston.
Q. That was the first time you mentioned it?
A. Yes, I may have talked about it on the ship, but I don't remember making any statement.
Q. Well, give us one thing or another, will you, Mr. Woodbury; did you say it in Boston or tell it on board the ship?
A. I may have spoken about it on the ship and I did tell it in Boston.
Q. Didn't you immediately go there, go on the ship and report it to the captain, report to the captain that this assault had occurred on the chief engineer by one of his help?
A. No, sir.
Q. As far as you know the chief engineer didn't make any report either, did he?
A. Not that I know of.
Q. That is a sort of a common occurrence, that would not be reported on that ship?
A. That is not my opinion of something that should be reported.
[fol. 196] Q. And you are a marine engineer, are you?
A. Yes, sir.
Q. And in your opinion does that contribute anything to the discipline of the ship?

Mr. Wolfe: I object to that.
The Court: Objection overruled.
Mr. Wolfe: Exception.

A. I consider it more of a personal affair on shore. I do not believe that it affects the discipline.
Q. Everybody was on duty, weren't they?
A. On duty. That is on the ship, yes.
Q. Well, those on shore were on duty?

A. No, sir, I was not on watch then.

Q. That is nine o'clock, isn't that your watch, eight to twelve?

A. Well, Mr. Jackson was standing my watch.

Q. Did you have any right to be ashore?

A. As long as the engineer was in the fire room I had a right to be ashore.

Q. Do you know if the rules provide that you are not allowed to be ashore in a foreign port?

Mr. Wolfe: I object, what are the rules, what rules?

Q. Do the rules provide that?

Mr. Wolfe: What rules?

A. I never was—I was always allowed to go ashore. [fol. 197] I never was held back.

Q. Were you present at the last trial?

A. Yes, sir.

Q. Did you hear the captain say that no one is allowed to go ashore in a foreign port?

A. Perhaps sir, I do not remember.

Q. Do you know anything about that rule, Mr. Woodbury?

A. Well——

Mr. Wolfe: I object to that as not proper cross examination, unless he specifies what rule.

Q. Did you do your watch on February 4th?

A. Yes, sir.

Q. Both watches?

A. Yes, sir.

Q. That is the date that the ship came into the stream?

A. Yes, sir.

Q. Well, what time and on what date did the ship dock?

A. She docked the morning of February 5th.

Q. What time?

A. I think it was around six o'clock in the morning.

Q. You went on watch at that time?

A. No, sir.

Q. Where were you?

A. Probably sleeping.

Q. On the 5th?

A. On the morning of the 5th, yes, sir.

Q. And then you went on the eight A. M. watch the morning of the 5th, is that right?

A. Yes, sir.

Q. And remained on until twelve o'clock noon?

A. Yes, sir.

Q. And then you went off and went ashore with the captain?

A. Yes, sir.

[fol. 198] Q. And his wife?

A. Yes, sir.

Q. How long did you remain ashore with the captain and his wife, do you know?

A. About a couple of hours, I think.

Q. And then when you returned to the ship what time was it?

A. Probably about four o'clock.

Q. How long did you remain on the ship then before you left again?

A. Probably about two or three hours.

Q. Did you have your dinner in the meantime?

A. Yes, sir.

Q. What else did you do in those two hours?

A. I don't remember what I did then.

Q. Well, you did not do anything that stands out in your memory now in this case, two or three hours nothing important that you remember?

A. No, sir.

Q. Just hung around the ship, is that right?

A. Yes, sir, that is probably right.

Q. And after supper, about six-thirty, you left the ship again, this time with Mr. Miller, is that it?

A. Yes, sir.

Q. Now you say you were with Miller two or three hours before the episode took place?

A. Yes, sir.

Q. What did you do in those two or three hours?

A. Well, we went over to the same places I had been in the afternoon and wandered around and then came back on the opposite side of the dock and sat down and talked for a while.

Q. You walked right over the same ground you went over with the captain and his wife?

[fol. 199] A. Practically the same, yes, sir.

Q. How far did you go, how far did you walk?

A. Probably about three miles altogether.

Q. Three miles with Miller?

A. Yes.

Q. Well, you were rather tired when you came back to sit on the beach, is that the idea?

A. Yes, sir.

Q. Was it bright on the beach or was it dark?

A. Quite dark as I remember it.

Q. How long after this episode on the beach did you go back to the ship?

A. Very soon afterwards; I don't know exactly.

Q. Well, give us more of an idea, was it an hour or a minute?

A. Well, perhaps ten or fifteen minutes.

Q. Now, when you went back on the ship what did you do?

A. Well, I saw Jackson, and I arranged with him about the watch, and I went back and turned in.

Q. And that is the first that you spoke to Jackson about the watch?

A. No, I saw him about supper time, I think it was about supper time.

Q. That is the second time you spoke to him about the watch?

A. Yes, sir.

Q. Of course, you realize you were going back on the boat about ten o'clock and could not arrange with Jackson at ten o'clock to do the work required around eight o'clock, eight to twelve watch?

A. No, sir.

Q. So now you told us you made that arrangement about supper time?

A. Well, he was working down there anyway.

[fol. 200] Q. Did you make that arrangement with him around supper time?

A. Standing the whole watch, no.

Q. Now, you are changing that a little bit, Mr. Woodbury, are you?

A. As I remember it——

Q. Now, are you changing it a little bit about the arrangement of that watch?

A. Yes.

Q. Now then, please tell us finally when you arranged with Jackson to do your watch from eight to twelve; give us the time?

A. Well, as I understand—As I remember it I spoke with Jackson at supper time and he was to look out for, he was to stand my place.

Q. That is all that I asked you, when?

Mr. Wolfe: I insist that he be allowed to——

Q. At supper time?

A. At supper time, yes.

The Court: Then what?

The Witness: Then when I came back he was going to stand the rest of the watch and let me know if she sails during that watch. Before, it was just until I got back to ship he was going to stand by.

Q. Now, was this beach dark? I asked you that and I have forgotten whether your answer was dark or bright?

A. It was quite dark.

Q. Now, Mr. Woodbury, will you try to tell us, try your [fol. 201] best to tell us what member of the crew was it that came to you and Miller's rescue when Cain made this attack on you on the beach?

A. I do not remember. I could not make any statement at all. I do not remember who was on the ship at the time, that is in the crew.

Q. Well, who else was with you at the time?

A. Mr. Miller was the only one.

Q. Just these three men?

A. Yes, sir.

Q. Who rendered the service to you?

A. I do not remember who was on the beach.

Q. Well, now there were three men?

A. Yes, sir.

Q. And this third man he rendered the service to you, did he, Mr. Woodbury?

A. I do not get just what you mean.

Q. Well, he stopped Cain in this assault, didn't he?

A. Miller?

Q. No, this third man. This person you could not remember anything about?

A. Well, there were two or three of them there. Miller and I. Miller was the only one with me ashore; then at the time of the episode there two or three or four others showed up.

Q. Now, I asked you just a minute ago, if there was any other person there, and you said, did you say, I believe you said there was one?

A. I think you made a mistake.

Q. This is the last time? Did you think so little of the man who saved you from this assault that you did not get his name so that he would have the benefit of it?

Mr. Wolfe: I object to that.

[fol. 202] Mr. Cuff: I withdraw the question.

Q. Give us the name of the man who came to your rescue, if you can?

A. I cannot.

Q. Of course, it was a member of the crew?

A. As I remember it, yes.

Q. One of your fellow workmen?

A. He did not work with me, no.

Q. Well, he worked on the boat with you?

A. Yes.

Q. Is there any way you can identify him so that we can locate him?

A. No.

Q. Now, at supper you spoke to Jackson about standing your watch from eight to twelve?

A. At the time I got back to the ship.

Q. At the time you got back to the ship?

A. Yes, sir.

Q. Well, where did you see Jackson and have this conversation with him? A. As I remember it at the supper table.

Q. Can you fix the time of that conversation?

A. About five o'clock.

Q. And Jackson said that he would do that?

A. Yes, sir.

Q. Well, when did you—I withdraw that. At what time did you come to the beach and sit down with Miller?

A. Well, probably about half or three-quarters of an hour before the episode.

Q. Well, fix the time if you can on that?

A. Probably about eight o'colck.

Q. About eight o'clock?

A. Yes, sir.

Q. You had been for a walk before that?

A. Yes, sir.

[fol. 203] Q. Did you stop any place when you were with Miller?

A. We stopped at several places probably.

Q. Did you go in them?

A. We did not go in any place, no, sir.

Q. Did you go in anywhere and sit down?

A. No, sir, we did not, not until we got back, not before.

Q. Kept standing up all the time?

A. Yes, sir.

Q. And when you came to the beach, and you were sitting on the beach, how far from the boat were you?

A. In a direct line, you mean?

Q. Yes.

A. Well, with the boat at the end of the dock, I should say a little less than a mile.

Q. Now, as I understand you now, you walked right up to that place on the beach where you sat down?

A. Yes, sir.

Q. What time did you learn that the boat was to sail at seven o'clock?

A. I do not remember much about those sailing orders.

Q. Well, will you tell the jury now, was the time fixed at seven P. M. on February 5th, for sailing?

A. As I remember it, no time was fixed, because the captain himself did not know what time we were sailing for shore.

Q. Do you concede that your memory is bad on that?

A. I know it is.

Q. You were present at the last trial, weren't you?

A. Yes, sir.

Q. And you heard the captain state the boat was to sail at seven P. M. on the 5th. You heard the first assistant [fol. 204] engineer make the same statement, didn't you?

Mr. Wolfe: I object.

Q. Did you hear the captain say that?

A. I guess so.

Q. You heard the engineer Mr. Pankor say the boat was sailing at seven P. M. on the 5th?

A. Probably, yes.

Q. And you heard Jackson say he was working in the engine room because the boat was to sail at seven P. M.?

A. Yes, sir.

Q. Well, then, your memory isn't so good, is it?

A. I can't remember much about the orders, no.

Q. Do you mean to tell us they did not tell you when the boat was to sail?

A. I was with the chief engineer and he knew about it, I guess. I did not try to remember.

Q. The chief knew it was to sail at seven o'clock?

A. We probably left after we found out that it was not going to sail then. Probably the captain knew that we were going to sail and the chief engineer knew that.

Q. Don't be telling me about probabilities?

A. I don't know.

Q. You were more than a mile away from the boat at seven o'clock?

A. No, less than a mile.

Q. Less than a mile?

A. Yes.

Q. Well, you were a mile from the point of the beach, to the boat, weren't you?

A. Probably, yes.

[fol. 205] Q. You told me that you walked up to that point, didn't you?

A. Yes.

Q. You told me that you walked up to that point, didn't you?

A. Yes.

Q. And then you were more than a mile away at seven o'clock?

A. At seven o'clock, yes.

Q. Well, you heard the other officers on this vessel say that the ship was scheduled to leave at seven P. M.?

A. Yes, sir.

Q. And you and the chief engineer were nowheres near the boat?

A. No, sir.

Q. Now, did you have anything to drink?

A. No, sir.

Q. Nor the chief either?

A. Not that I know of.

Q. Well, try to recall.

A. I did not see him take anything to drink.

Q. You know he drinks, don't you?

A. Yes.

Q. And you take a drink yourself, don't you?

A. Yes.

Q. You can't get any drinks here in the United States, can you?

The Court: Since when?

Q. Well, you left the United States and this was the first foreign port that you had reached?

A. I think that is right, on that trip, yes.

Q. Now, Mr. Woodbury, after you came back on the boat, after the episode, tell us what you did?

A. When I got back to the ship I saw Jackson and talked to him a while.

[fol. 206] Q. Well, where did you see him?

A. In the engine room.

Q. All right, tell us what you did.

A. I talked with him a while and arranged about his calling me in case the ship should sail before twelve, and then I went up and turned in.

Q. What time did you have this conversation with Jackson?

A. I don't know what time it was.

Q. What time did you turn in?

A. Right after I talked with him.

Q. Now, Mr. Woodbury, try and give the jury the best you can, the time when you went to bed that night.

A. Probably about a quarter to ten.

Q. A quarter to ten?

A. Yes, sir.

Q. Well, where are your quarters for sleeping?

A. On the starboard side aft.

Q. Of this main deck?

A. Of the whole ship.

Q. Which deck?

A. It is underneath the top deck.

Q. How far is that from the engine room, in feet?

A. Oh, probably about seventy-five to a hundred feet.

Q. That is, you would have to walk in one direction seventy-five or a hundred feet?

A. Yes, sir.

Q. Did you take in both directions when you said seventy-five feet?

A. No, sir. Into the engine room.

Q. How long would you have to walk before you came to the stairs to go down—how far do you figure the depth? [fol. 207] A. Well, it is about 75 feet into the engine room, and then there are two flights of ladders.

Q. Well, how many feet are those flights of ladders?

A. Probably about twenty or twenty-five feet.

Q. And your quarters were about 100 feet away from the engine room?

A. Yes.

Q. Where is the clock on the ship?

A. Over by the deck, with the log, in the engine room.

Q. Over by the log desk?

A. Yes, sir.

Q. By that you mean the ordinary clock like this one here (indicating court room clock)?

A. Yes, sir.

Q. What time did you awaken?

A. It was around one o'clock.

Q. Well, tell us what happened then?

A. Well, I went out in the engine room and as I went in Mr. Jackson was coming down from above and we, the both of us, went below. I found out about the sailing orders and then I stood talking for a while, and then I went back up and turned in.

Q. This was about one o'clock?

A. Yes.

Q. Well, can you be a little more exact?

A. I can't tell you exactly.

Q. Well, "about one o'clock" might mean half past twelve or half past one. Can you give me any idea more closely?

A. Well, it was pretty close to one o'clock.

Q. Within a couple of minutes?

A. Probably, I don't know.

Q. Now, you say Jackson was coming down and you were going up?

A. No, sir, as I was going into the engine room——

[fol. 208] Q. Did Jackson come down a different flight of stairs from the one that you used?

A. Well, the engine room, that is the upper grating is on the same level as my room. There is a flight of ladders above that to the main deck. Jackson was going down that flight of ladders as I was going into the engine room at the same time.

Q. Now, your work ended at twelve o'clock midnight?

A. Yes, sir.

Q. And Jackson had stood your watch for you, hadn't he?

A. Yes, sir.

Q. That was already arranged?

A. Yes, sir.

Q. And if the boat sailed on your watch, I remember you say that Jackson was to call you?

A. Yes, sir.

Q. Did Jackson call you?

A. No, sir.

Q. Did you oversleep that night?

A. I slept late.

Q. Did you oversleep?

A. I slept past my watch, yes, sir.

Q. Well, does that mean anything. You slept past the end of your watch. You did not sleep past the beginning of your watch, did you?

A. No.

Q. I asked you a question. Did you oversleep?

A. Yes.

Q. That is what you said at the last trial too, isn't it?

A. I think so.

Q. Now, you told us that Jackson did not call you. You awakened yourself?

A. Yes, sir.

Q. I call your attention to this question and your answer, [fol. 209] the question that was asked of you late at the last trial; I am reading from page 264:

"By the Court:

Q. You had overslept then?

A. Yes, Mr. Jackson having called me."

Did you make that answer to that question?

A. No, sir.

Q. I read you the previous question, it might refresh your recollection. I read from page 263:

"By the Court:

Q. How did you happen to be in the engine room if you did testify you were there about one o'clock? How did you happen to be there if your watch was not until eight o'clock?

Juror Number Eleven: That is it exactly.

The Witness: Well, Mr. Jackson was going to call me if the ship sailed during my watch, and I woke up suddenly and I did not know what time it was, so I went down into the engine room to see if I should be below. That is how I happened to be in the engine room at that time. I overslept past my watch.

The Court: You had overslept then?

The Witness: Yes, Mr. Jackson having called me."

Do you remember that?

A. I must have said it if it is there.

Q. Well, did Jackson call you or didn't he?

[fol. 210] A. He did not call me.

Q. Well, why did you jump up out of your bed at one o'clock, just at the particular time when this assault took place, to go down into the engine room when your duty didn't call you there?

A. Well, I woke up and I was afraid that the ship was sailing then and Jackson would not be in a position where he could call me and so I went down to see him and save him the trouble.

Q. When you got up, couldn't you tell whether the boat was moving or not?

A. Yes.

Q. Why did you have to go out of the room?

A. To see if she was going to sail.

Q. You just said that the ship was going to sail?

A. Yes.

Q. Well, you didn't have anything to do with it at that time?

A. I don't know what time it was then.

Q. Well, now, the purpose of all your testimony is to get you down in that engine at one o'clock, isn't it?

Mr. Wolfe: I object.

The Court: Objection overruled.

Mr. Wolfe: Exception.

Q. You had no object in that engine room at one o'clock in the morning on February 6th, did you?

A. No, sir.

Q. And you walked six miles that day, yet you were down there talking, weren't you?

A. Yes, sir.

Q. And having no object there, the only reason you can [fol. 211] give for being there is that you were carrying on a conversation?

A. Yes, sir.

Q. Then it was that you saw Jackson come down there and you observed him to be sober?

A. Yes, sir.

Q. And Pankor was sober also?

A. Yes, sir.

Q. Now then, what were the three engineers doing in the engine room at three o'clock in the morning, when the boat was not sailing, or ready to sail?

A. She was ready to sail, that is as far as I know, the engines were ready.

Q. The boat was not sailing until seven o'clock the next morning.

A. Well, the engines were ready to turn over, I know that.

Q. Of course they were ready.

A. I was down there——

Q. Well, now, we have three of you in the engine room at one A. M., February 6th, carrying on a conversation, is that right?

A. Yes, sir.

Q. Nothing at all to do?

A. No, sir.

Mr. Cuff: That is all.

Redirect examination.

By Mr. Wolfe:

Q. With respect to the construction of the engine room, and the gratings and the stairway, or companionway, describe the top grating.

[fol. 212] A. The very top grating?

Q. Yes.

A. The top grating was on a level with the main deck. It runs athwartships, that is, from one side of the engine room to the other. In the center there is a ladder going down to a middle grating.

Q. Now, is there anything underneath the top grating?

A. The store room.

Q. And is it possible to see from the top grating down into the engine room and see the telegraph?

Mr. Cuff: I don't think there is any issue about a telegraph.

The Witness: No, sir, because the exhaust pipes from the high pressure turbine is directly over it, and a little to forward.

Q. Now, can you stand at the top grating and see a couple of men standing by the telegraph?

A. I think not, no, sir.

Q. Do you know whether or not there was any dust catcher under the top grating?

A. Yes, sir, there was.

Q. There was?

A. Yes, sir.

Q. What is that dust catcher made of?

A. Canvas.

Q. Just stretched underneath the whole grating?

A. Yes, sir.

Q. Nothing on the sides on the grating?

A. No, sir.

Q. Nothing on the wings projecting beyond the sides?

A. No, sir.

[fol. 213] Q. Can you see through this canvas?

A. No, sir.

Q. What is on the second grating?

A. That is around the same way.

Q. Is there a dust catcher?
A. Yes, sir.
Q. And the third grating?
A. That is the dynamo platform.
Q. As I understand it, you said that it is impossible to stand on the top grating and look down from the top grating into the engine room?

The Court: He did not say that.

Q. Is it possible?

The Court: You were beginning to repeat his testimony and I interrupted by saying that he did not say that. He says I don't think that it could.

Q. Can you state, Mr. Woodbury, whether it is possible to stand on the top grating and look down through the grating into the engine room?
A. It is impossible.
Mr. Cuff: I object to that as having already been answered.
The Court: The engine room, he did not ask it before.

Q. Now can you see the telegraph from the top grating?
A. No, sir.
Q. Well, now, after this last trial, Mr. Woodbury, you [fol. 214] were approached by the plaintiff's attorney?
A. Yes.

Mr. Cuff: I object to this.
The Court: Objection overruled.
Mr. Cuff: Exception.

Q. Did you receive a letter from the plaintiff's attorney, asking you to go to his office, or come to his office?
A. Yes, sir.
Q. You did receive such a letter?
A. Yes, sir.

The Court: Did you go?
The Witness: Yes, sir.

Q. Did he ask you if you told the truth at the last trial?

Mr. Cuff: I object to that.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. Yes, sir.
Q. What did you tell him?

Mr. Cuff: I object to that.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. That I had.

Q. Now let us get this straight. At about when the ship was ready. You were asked if the ship was ready to sail [fol. 215] at seven o'clock or was going to sail at seven o'clock. Now where did you get that information, do you recall?

A. When the ship was ready to sail?
Q. That she was going to sail at seven.

The Court: In the evening of the 5th.
The Witness: I do not recall where I got the information.

Q. When you were asked that the vessel was ready to said, what did you mean by the words "Ready to sail"?

Mr. Cuff: I object.
The Court: He may answer what he understood.
Mr. Cuff: Exception.
The Witness: I meant that the engine room was ready.

Q. That did not include whether or not the vessel had her clearance papers at this time, did it?

A. No, sir.

Q. You were referring to the engine room being ready for sailing?

A. Yes, sir.
Q. The engines were ready to turn over?
A. Yes, sir.

Q. Now with respect to this last trial, when Mr. Cuff asked you whether you said this: "Mr. Jackson having called me"—I withdraw that.

Q. Is it true that Jackson called you, or didn't he?
A. He didn't call me.

[fol. 216] Q. Are you certain that at the last trial you said that Mr. Jackson had called you?

A. No, sir, I am not certain.

Q. As a matter of fact, the statement which you made would read more intelligently if you had said. "Mr. Jackson having"—I will withdraw that.

As a matter of fact, the statement that you made would read more intelligently if you had said that he did not call you?

Mr. Cuff: I object to that.
The Court: The objection is sustained.

Q. In any event, if you did say that, "Mr. Jackson having called me," that was not what you meant?
A. No, sir.

Mr. Wolfe: That's all.

Recross-examination.

By Mr. Cuff:

Q. You received a letter from me in the mail, didn't you?
A. Yes, sir.
Q. And I asked you to call at my office, didn't I?
A. Yes, sir.
Q. And you did, didn't you?
A. Yes, sir.
Q. Well, where were you living at the time you got that letter?
A. In New York.
Q. Was that the address on the letter or was it forwarded to you from some place else?
A. It was forwarded to me.
[fol. 217] Q. It was forwarded to you from the address you had at the time you had when you were on the boat, wasn't it?
A. Yes, sir.
Q. And that is the address we got from the ship's articles, isn't it?
A. Yes, sir.
Q. Now you recall my asking you if you knew whether or not you could give me the name of the person who was on the beach with you and the chief, and you told me at that time that you could not?
A. No, sir, I do not remember that.
Q. I asked you also if there was anything further with respect to this case that you knew about that you wanted to tell me?
A. Yes, sir.
Q. And you said that there was not anything more?

A. Yes, sir.

Q. And I asked you if you knew where any other members of the crew could be located, didn't I?

A. Yes, sir.

Q. And that was about the full extent of our conversation, wasn't it?

A. Yes, sir.

Q. Now, Mr. Woodbury, you said that you could not see two persons when standing on the upper grating, who would be down somewhere in the engine room near the platform?

A. I said that you could not see two persons if they were standing by the telegraph.

Q. Well, we are not asking you about that. We are asking you, can you see from the upper grating down. A person standing at the upper grating, when they looked down, in front of the stair case, you could see persons standing there?

[fol. 218] A. You could see the after part of the engine room.

Q. You could see the floor, couldn't you?

A. A little, yes.

Q. Well, if I went down those stairs and stood there, could you see me?

A. No, sir.

Q. Well, if I walked around a little bit, I would come to a place where you could see me, wouldn't I?

A. Yes, sir.

Q. But your answer was that it was impossible to see when counsel linked the question with "Standing near the telegraph?"

A. Yes, sir.

Mr. Cuff: That's all.

Mr. Wolfe: That's all.

(Five minutes recess.)

NELZER ALDEN WOODBURY recalled.

By Mr. Cuff:

Q. Now, Mr. Woodbury, you spoke about the dust catchers on those stairs?

A. On the gratings, I said.

Q. And on the gratings also?

The Court: Just on the gratings.

The Witness: They were on the stairs too .

Q. You said they were on top of the gratings.

[fol. 219] That is what I remember your saying.

A. Yes, sir.

Q. Do you recall that those dust catchers were off the gratings at the time, and that the gratings were being painted?

A. No, sir, I do not.

Q. You are positive that the dust catchers were on top of the gratings?

A. I am not positive, no.

Q. Now, would you just be sure of one other thing: A man is standing down below, somewhere near the telegraph. Can you see him, or can't you?

A. Not from the top grating.

Q. But by moving around somewhere where you could look down into space, then you could see him?

A. You have got to go away aft on the engineroom to see the person from the top grating.

Q. But you could see him?

A. Yes, sir.

By Mr. Wolfe:

Q. Is the telegraph anywhere near the after part of the engineroom?

A. No, sir.

Mr. Wolfe: That's all.

[fol. 220] Matthew Pankor, called as a witness on behalf of the defendant, was sworn and testified as follows:

Direct examination.

By Mr. Wolfe:.

Q. Will you please speak up loudly, Mr. Pankor; you know we had trouble hearing you at the last trial?

A. Yes, sir, I will try.

Q. Mr. Pankor, what is your occupation?

A. Marine engineer.
Q. Marine engineer?
A. Yes.
Q. Still louder please, Mr. Pankor. What licenses have you got?
A. Chief engineer's.
Q. How long have you had a chief engineer's license?
A. Since 1924.
Q. How long?
A. Since '24.
Q. How long have you been going to sea, Mr. Pankor?
A. December coming it will be twenty-three years.
Q. Next December will be twenty-three years you have been going to sea?
A. That's right.
Q. Where was your chief engineer's license issued?
A. New York City.
Q. Are you employed by the defendant in this case, Walker & Daly?
A. I am employed by the Gulf Refining Company now.
Q. By the Gulf Refining Company?
A. Yes, sir, at present.
Q. Have you got any interest in this suit one way or another?
A. Yes, sir.
Q. What interest have you got? How are you interested in this suit?
A. The Gulf Refining Company notified me.
[fol. 221] Q. I know that you got a leave of absence, but have you got any interest in the way this suit turns out, as to who wins the suit?
A. I don't know.
Q. Were you in the navy during the war?
A. Yes, sir.

Mr. Cuff: I object to that and ask to have the answer withdrawn.
The Court: What has that to do with this case?
Mr. Wolfe: Qualifications.
The Court: How does that qualify him in this case?
Mr. Wolfe: The same way that his license does.
The Court: Well, maybe his license does not qualify him in this case.

Mr. Wolfe: Your Honor so rules?
The Court: I do. The objection is sustained.
Mr. Wolfe: Exception.

Q. Now were you on the Steamship Alpha on February 5th, 1927?
A. Yes, sir, I was.
Q. And what was your position on the Steamship Alpha?
A. I was first assistant engineer.
Q. First assistant engineer?
A. Yes, sir.
Q. Who was the second assistant engineer?
A. Jackson.
Q. Well, who was the third assistant?
A. Woodbury.
Q. And what watch did you have on that ship?
A. The chief engineer's watch.
Q. I know, but what watch is that?
[fol. 222] A. That is the watch from four to eight in the morning and four to eight in the afternoon.
Q. It is the general custom for the first assistant to stand the four to eight watch, is that right?
A. Yes, sir.
Q. Now did you stand the four to eight watch on the afternoon of Febraury 5th, 1927?
A. Well, I started to work after supper.
Q. No, did you change your regular watch?
A. No, sir, not in port, not until the ship is sailing.
Q. Is it customary when a vessel arrives in port for the first assistant to stand the watch?
A. No.

Mr. Cuff: I object to that question and ask to have the answer stricken out.
The Court: The objection is sustained.
Mr. Wolfe: Exception.

Q. Did you do any work on the afternoon of February 5th, 1927?
A. I was working until half past one, from eight o'clock until half past one in the afternoon.
Q. That is on the 5th?
A. Yes, on the 5th.

Q. Well, in the afternoon what did you do, the afternoon of February 5th?

A. I do my repair work in the engineroom, whatever is necessary.

The Court: I do not understand you. I am sure the jury cannot hear you talk.

The Witness: I did my necessary repairs on the pumping engine.

[fol. 223] Q. You were working on the pumps, were you?

A. Yes.

Q. Is that in the afternoon you are speaking of now?

A. Well, I might be on one job, and then sometimes I might be doing another.

Q. I am talking about February 5th. What were you doing in the afternoon of February 5th?

A. February 5th.

Q. Yes.

A. The last job I done on February 5th, I renewed the broken steam line reducing valve, and when I finished that I knocked off.

Q. What time did you finish renewing the broken steam valve?

A. After one o'clock.

Q. And after that on the 5th, what did you do?

A. Nothing.

Q. Did you go ashore or stay aboard the vessel?

A. I did go ashore.

Q. You went ashore?

A. Yes, sir.

Q. With whom did you go ashore?

A. Me, the captain, the captain's wife, and Mr. Woodbury.

Q. You, the captain, the captain's wife, and the third assistant, Mr. Woodbury?

A. Yes, sir.

Q. What time in the afternoon was that?

A. About two o'clock.

Q. What time did you go back to the ship?

A. About four o'clock.

Q. What time did you go ashore?

A. A little before two.

Q. A little before two?

A. Yes, sir.

Q. And you got back to the ship around four?

A. Yes, sir.

Q. Now after four o'clock what did you do?

A. I didn't do anything until supper time, five o'clock.

[fol. 224] Q. Well, after you had your supper, what did you do?

A. I got orders from the captain to get the engineroom ready.

Q. Do what?

A. I said I got orders from the captain to get the engineroom ready in case we should sail.

Q. In case you should sail you had orders from the captain to get the engineroom ready?

A. Yes.

Q. When did you get those orders?

A. At five o'clock while they were eating supper.

Q. Now did you go down in the engineroom?

A. Yes, sir.

Q. What time?

A. Some time after supper.

Q. Well, when you got down there who was there after supper?

A. I got down and got the steam ready.

Q. No, who was down there after supper?

A. Mr. Jackson was down there, the second assistant.

Q. Jackson?

A. Yes.

Q. What was Jackson doing?

A. He was working in the boiler room.

Q. Working on the boilers?

A. Yes, sir.

Q. Do you know a drunken man when you see one?

A. No, sir, I was not drunk.

The Court: Do you know whether a man is drunk or not?

The Witness: Sure I do.

Q. Was Jackson drunk or sober?

A. Sober.

Q. Are you positive of that?

A. Yes.

Q. Did you talk with him?

A. Yes, sir.

[fol. 225] Q. How long did you stay in the engineroom?

A. Until I got the engines ready around seven o'clock. I got steam on and then I started all the auxilliaries, and I started the main engine to warm them up and get them ready.

The Court: Until when, until what time?

The Witness: Somewheres around before seven. We started the engines at six o'clock.

Q. Did you come up at six o'clock?

A. No, sir.

Q. What time did you come up?

A. It was after seven o'clock the first time.

Q. The first time?

A. Yes, sir.

Q. The first time was after seven o'clock?

A. Yes.

Q. Did you go down in the engineroom again that night?

A. Yes, sir, I was steady down in the engineroom up until one o'clock.

Q. From the time, when you say you were there straight until one o'clock?

The Court: You came up after seven. When did you go down again?

The Witness: About five minutes later.

The Court: Did you stay down?

The Witness: No, sir. I came up once in a while, to get a breath of fresh air, because it is hot down there.

Q. But you were working there all that evening?

[fol. 226] A. Yes.

Q. And then you would come up on deck and go down again?

A. I was up a couple of times.

The Court: When did you have any dinner?

The Witness: At five o'clock.

Q. Now, Mr. Cain testified that when he went on watch around one o'clock, or slightly before one, he found you on the top grating, or the second grating, drunk, and that

you hit him. Now will you describe for the benefit of the Court and jury, what happened when you met Cain on the second grating, or which ever grating it was, on the morning of the 6th, around one o'clock?

A. Well, I was going up from the engineroom. I was on the middle ladder and Cain was at the top ladder. He stayed there and I asked him what was he doing. He says nothing. I says, Why don't you go down on watch, it is one o'clock now? He says, What have I got to do with it?

The Court: You mean what have you got to do with it?

The Witness: That is what he said. He says, "What have you got to do with me"?

The Court: He said, "What have you got to do with me?"

The Witness: Yes, sir.

Q. Was he on your watch?

[fol. 227] A. No, sir, he was on the twelve to four watch.

The Court: Well, what did you say to him?

The Witness: I took his left arm like that (indicating). I says, Shorty, it is your place to be down below now.

The Court: How did you get hold of his left arm if you were on top? Did he come down?

The Witness: He came down and I got up the middle ladder, and we met together on the middle grating. He stayed there and he would not come any further. I asked him if he would go down, and then I took his left arm and I says, See if you can make that ladder down below. He could not do it.

The Court: What do you mean he could not?

The Witness: He was intoxicated heavy.

Q. Was he too intoxicated in your opinion, to get down the ladder?

A. I would not let a man down below when he was drunk. That is my orders. Nobody to go down below. He could not get down so I sent him up on deck.

The Court: Wait a minute. You say he could not. You mean you would not let him?

The Witness: He was too drunk.

The Court: No, no, no. You mean that he could not work [fol. 228] down there because he was too drunk or because

he was too drunk you would not let him go down, which do you mean?

The Witness: I mean if a man takes a hand rail in his hand, to get down the ladder when he is drunk, he may fall down, so I stopped him. I would not let him go any further.

The Court: Well, could not he fall up too?

The Witness: I went after him, I helped him up. I told him to get up and I went after him. He got up the short ladder and I went down below again, but at the same time he turned around, he turned around and put his left hand out and pulled off my glasses. I grabbed the glasses at the same time, and the hook broke. And I says, "Give me my glasses before you drop them on the floor and break them." So I took the glasses out of his hand and said, "Get up this ladder." He got up the ladder then and just at that time the signal rang again, the signal telegraph warning. That is from the pilot house.

Q. Is that the stand-by bell?

A. That is from the pilot house. I heard that bell and I went down again and that is all I seen of Cain. I never seen him at all after the accident happened later on.

[fol. 229] Q. Up to this point state whether or not you struck Cain while you were on the second grating with him?

A. No, sir, I did not hit him.

Q. Did he strike you?

A. No, sir, he just took off my glasses.

Q. What was his condition when this episode occurred?

A. He was drunk.

Q. Would you let him go down on watch in the condition he was in?

A. I would not let him, or no man drunk, on watch.

Q. What did you do after the bell, the stand-by bell, rung?

A. I went down below.

Q. Who was there at that time?

A. Jackson. He came out of the fire room and he was also down there.

Q. Anybody else?

A. The oiler was down there below.

Q. Was there any firemen down there?

A. We did not have a fireman yet.

Q. When you got down below did you have a conversation with Jackson?

A. No, sir, I just asked him what does this mean. He says the telegraph rang back and they put it to stand by again.

Q. Did you talk about Cain?

A. No, sir, I just told Jackson I met Cain on the grating, on top, and that he is drunk and I would not permit him to come down below.

Mr. Cuff: I move to strike it out.

The Court: Strike it out.

Q. In any event, you had a conversation with Jackson in which Cain was mentioned?

[fol. 230] Mr. Cuff: I object to that, your Honor.

The Court: What is the difference?

Mr. Wolfe: The fact that he had a conversation with Jackson, is not admissible?

The Court: What has Cain got to do with that, the objection is sustained.

Mr. Wolfe: Exception.

Q. After you had a conversation what did Jackson do?

A. Jackson didn't do anything at the present but I just explained to him——

Q. What did he do, never mind the explanation.

A. Well, I said we have got to have a man, and I told him we have got to have a full watch down below if the ship sails. We have got to have a fireman to watch the fires, and the boiler, and an engineer to stand by the engine. The other engineer has to give a hand also.

Q. Well, what did Jackson do after the conversation with him?

A. I told him to get another fireman.

Q. What did he do?

A. He went up to get another fireman.

Q. He went up to the top side?

A. Yes, sir.

Q. Can you see where you were what happened on the top grating?

A. No, sir.

Q. It has been testified to here that you could see from the top grating down below in the engineroom and that you could see the telegraph and people near the telegraph?

The Court: Who testified you could see the telegraph?
[fol. 231] Mr. Wolfe: I understand Mr. Cain did.
The Court: I don't remember that.
Mr. Wolfe: Very well, your Honor, I withdraw the question.

Q. Is it possible to stand on the top grating and see the telegraph?
A. No, sir.
Q. Is it possible to stand on the top grating and see anyone within a few feet of the telegraph?
A. No, sir, not when a man is at the engine.
Q. Why not?
A. Well, the top grating which is about thirty inches wide is there, and there is a big store room underneath it, and that is about three feet and extends aft from the grating to the engineroom. The store room—the top of the store room is like a ceiling there.
Q. Is that underneath the top grating?
A. Yes. And over the grating there is some wooden boards, and then a canvas runs right aeross. You could not see anything through it.
Q. What is the purpose of the canvas?
A. Well, it is just to keep the dirt from going down.
Q. Did I understand you correctly to say that there were boards on top of the grating?
A. Yes, and then the canvas.
Q. And then underneath the grating is the top of the store room, is that correct?
A. Yes, sir.
Q. What part of the engine can you see from the top grating?
A. Away after, in the part under the dynamo.
[fol. 232] Q. Tell us how much of the engineroom can be seen from the top grating. That is the after half of the after third, how much can be seen?
A. Well, somewhere less than half.
Q. Less than half?
A. Yes, sir.

Q. And is that telegraph in that aft that can be seen from the top grating?

A. No. Because there is a big exhaust pipe goes from one engine to another. That is about thirty-six inches in diameter.

Q. I asked you if the telegraph was in the after half of the engineroom?

A. A little after of the engine. But you could not see it on account of the exhaust pipe.

Q. Now, what was your own condition that night? Were you drunk or sober?

A. Sober.

Q. Did you hear a conversation between the plaintiff and the chief engineer about signing this statement?

A. Yes.

Mr. Cuff: What statement?

Mr. Wolfe: Defendant's Exhibit A for identification.

Q. Well, give us the substance of the conversation that you heard between the chief engineer and Cain with reference to signing the statement?

Mr. Cuff: I object to that unless the statement is produced. He may have signed many statements. We want to know the one that he is talking about. Give the witness the statement and let him read from that.

[fol. 233] Q. You didn't see him sign the statement, did you?

A. Yes, sir.

Q. You saw him sign it?

A. Yes, sir.

Q. Well, take first of all, this statement which he signed. Was the statement which the plaintiff Cain signed, read over to him before he signed it or afterwards?

Mr. Cuff: I object to that as leading.

The Court: The objection is sustained.

Q. Will you state what happened with respect to any reading of the statement, whether it was read or not at the time, before or after the statement was signed?

Mr. Cuff: I object.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. He read it himself.

The Court: He read it himself. Who do you mean by he?

The Witness: Cain.

The Court: You mean, you say you saw him take this paper?

The Witness: He laid in bed like this, and took the paper and read it. Mr. Miller asked him if he signs, and he said yes, so he gave him a pen and he signs it. I was in the dining room just outside the door.

Q. After the accident did you have occasion to talk with Mr. Cain?

[fol. 234] Yes, I did.

Q. Did you talk about the accident?

A. I asked him what happened.

Q. Did you talk about the accident?

A. Yes.

Q. Will you state what you said to the plaintiff and what he said to you with respect to the accident?

A. I asked him what happened, to explain me the trouble, and he said that he fell down a couple of times on deck amongst the pipe and tank coverings and valves, somewheres.

Q. After the accident, on the morning of the 6th, did you see the captain of the vessel?

A. The captain?

Q. Yes.

A. Yes, sir.

Q. What were the situations under which you saw the captain? Where did you see him?

A. I seen him dressing Mr. Cain in the cabin.

Q. Where was that?

A. In the cabin.

Q. In the salon you mean?

A. In the salon, exactly.

Q. Were other people present at that time?

A. I went in there when I found out—when I received the report. The captain told me—there was a bunch of us down there, and he told us to get out.

Q. Was Jackson there?
A. He came up later on too.
Q. He was there.
A. Yes, sir.
Q. Did you have any conversation with the captain?
A. No, sir, that is all I had.

Mr. Wolfe: That is all.

[fol. 235] Cross-examination.

By Mr. Cuff:

Q. What day and what time did you say that the boat anchored in the stream?
A. What is that?
Q. I ask you what day and at what time did you say that the boat anchored in the stream?
A. Anchored in the stream?
Q. Yes.
A. When we arrived at Venezuela?
Q. Yes.
A. I cannot tell you exactly the hour but it was around somewhere after before or maybe three o'clock it was. Somewheres near that, on the third of February.
Q. February 3rd.
A. Yes, sir.

The Court: Two or three o'clock in the morning.
The Witness: No, in the afternoon.

Q. Now then do you recall the 5th of February?
A. Well, five in the morning we docked.
Q. You recall that day, don't you? You do know all about what happened on that day?
A. Yes, sir.
Q. Jackson went ashore that day, didn't he?
A. I can't say because I was down below. It was four o'clock when we docked.
Q. You don't know whether he went ashore on February 5th or not?
A. I do not know whether he did in the morning or not. I was down below all morning. I told him to go take a watch. It is twelve o'clock.
Q. Do you know whether he went ashore?
A. I am not sure.

[fol. 236] Q. Jackson is your immediate assistant, isn't he?

A. Yes.

Q. And you ought to know where he was, had you not?

A. He was working. I do not care where a man goes. I told him to be on watch at twelve o'clock.

Q. You don't care where a man goes?

A. No, I told him to be on watch at twelve o'clock. That is my orders.

Q. Now, at page 297 of the testimony of the previous trial —I will withdraw that. You went alongside of the dock on what day?

A. Well, just about——

Q. Before the accident. You got alongside the dock on February 5th?

A. On the morning, between six and seven.

Q. On February 4th?

A. No, on February 5th. We docked the ship on February 5th between six and seven.

Q. All right. And then you were two days out in the stream?

A. Yes, sir, there were four ships ahead of us.

Q. On the morning that you docked, that would be February 5th?

A. Exactly.

Q. And you left on the morning of February 6th, didn't you?

A. Yes, sir.

Q. Now, I ask you if you remember this question and your making this answer at the last trial. I am reading from page 297 of the transcript.

"Q. The second engineer is your immediate assistant, isn't he?

A. The second engineer is what——

Q. He is your immediate assistant, isn't he?

[fol. 237] A. He went ashore the next morning when the boat came to the dock.

Q. He is your immediate assistant. He is your immediate assistant, isn't he?

A. Yes.

Q. And you should know what movements he makes, shouldn't you?

A. Yes, but he went ashore the next day and I know he was ashore the next day."

Q. Now, you say you don't know whether he was ashore or not?

A. I did not see him go ashore.

Q. But you told us at the last trial that you know that he went ashore on February 5th. Now you say you don't know whether he did or not?

A. I did not see any man go ashore.

Q. Well, what time was it that the captain told you that the boat was to sail?

A. Five o'clock. Around four o'clock, something like that.

Q. He told you the boat was going to sail at seven P. M. that night, didn't he?

A. He told me to get the engines ready, that we probably would sail.

Q. He told you the boat was to sail at seven P. M. that night?

A. He says "Get the engines ready for seven o'clock." That means we are sailing.

Q. That means you are sailing at seven o'clock.

A. Well, I got the engines ready I don't care whether it sails or not. I am ready anyhow.

Q. The captain told you the boat was to sail at seven o'clock?

A. He tells me to get the engines ready.

[fol. 238] Q. I am talking about the boat sailing.

A. Well, he probably would sail. We didn't sail until the next morning.

Q. All right. I now read to you from the record of the last trial, page 297, in which you were asked this question:

"Q. Captain, the captain told you that the boat was sailing at what time?

A. Seven o'clock in the evening."

Did you make that answer to that question at the last trial?

A. Well, we were ready to sail; the engines were ready.

The Court: No, no. Did you make that answer at the last trial.

The Witness: Probably I said it that way.

Q. Now, you say that the captain only told you to get the engines ready.

A. Get the engines ready in case we sail.

Q. And you want to change that, do you?

A. The captain with a ship where the engines are not ready.

Q. The captain told you that the boat was to sail at seven o'clock. What did you tell Mr. Woodbury, your immediate assistant?

A. I don't know what I tell him.

Q. You didn't tell him anything, did you?

A. I forgot now, I don't know what I said.

Q. Do you know that Mr. Woodbury walked off the boat immediately after supper?

Mr. Wolfe: I object to that as incompetent, irrelevant and immaterial.

[fol. 239] The Court: The objection is overruled.

Mr. Wolfe: Exception.

Q. Do you know that Mr. Woodbury walked off the boat immediately after supper with your chief engineer?

A. I did not see him going ashore but I knew he was ashore.

Q. When did you find out that he was ashore?

A. Oh, somewhere around half past seven or eight o'clock.

Q. When the captain told you at five o'clock that the boat was to sail at seven o'clock. Do you now tell this jury that you——

Mr. Wolfe: I object your Honor, he never said any such thing.

Q. Now, your counsel has raised a question about this very important matter.

The Court: You have all gone over it at the last trial.

Q. And may I ask this question. I ask you was this question put to you——

The Court: Is this the same one you asked before?

Mr. Cuff: Yes, your Honor.

The Court: No, this has already been asked and answered.

Q. Now, then, the captain told you then the boat was to sail at seven o'clock?

A. He would like to get out at seven.

[fol. 240] Q. He told you that about four or five o'clock, didn't he?

A. The first time at four o'clock and then I came out to find out for sure. I asked him at the supper table. He says probably we will sail at seven o'clock if everything is ready.

Q. Did you have your supper that night with the third assistant, Woodbury?

A. Yes, sir, everybody aboard was there.

Q. Was the chief there?

A. Yes, sir, of course he was there too.

Q. At that time the captain said well probably we will sail at seven o'clock?

A. Yes.

Q. And everybody heard that, didn't they?

A. I suppose they did.

Q. Now, Mr. Woodbury is your immediate superior, he is, isn't he?

A. Yes, sir.

Q. And if the boat was to sail at seven o'clock, he should be on the job, shouldn't he?

A. Not necessarily.

Q. He could be on the shore?

A. Well, he could stay on the dock until they cut the lines off and then come aboard.

Q. That would be all right, would it?

A. Sure.

Q. With the boat sailing at seven o'clock he could stay on the dock until the lines were loose, is that it?

A. Well, he could.

Q. Didn't you say on direct examination at sailing time you should have a full crew of engineers in the engineroom?

A. Yes, of course, I mean I must be sure that two engineers were there.

Q. But you said a full crew of engineers?

[fol. 241] A. Well, they should be aboard or somewheres near the ship.

Q. Although the boat was sailing at seven o'clock, and Mr. Woodbury testified that he and the chief engineer left the ship at about six o'clock and went three miles away?

A. I don't know how far they were gone.
Q. You don't know about that?
A. I knew it was ashore they were.
Q. Wasn't it due to your condition that you didn't know what was going on on the boat?
A. I can't answer that counsellor.
Q. You could not state that at all?
A. No.
Q. You didn't have any authority over these men?
A. Not the chief.
Q. I am talking about the third assistant. Did he come and go when he liked?
A. He did not go by himself. He went with the chief engineer.
Q. And you didn't know where they went or when they went?
A. No.
Q. Or when they came back?
A. They was back somewheres after eight o'clock.
Q. If the boat was to sail at seven o'clock that would not have been time enough, would it?
—. ——.
A. If the boat sailed at seven o'clock they would not have been aboard, would they?
A. Well, the boat didn't sail.
Q. Well, if it did sail as planned, they would be left ashore, wouldn't they.
A. We did not sail.

Mr. Wolfe: Please let him complete his answers, Mr. Cuff.

(Recess taken until two o'clock P. M.).

[fol. 242] (After Recess—Two o'clock p. m.)

Trial resumed.

Mr. Wolfe: If your Honor please, it is consented to by Mr. Cuff to hold up his cross examination of Mr. Pankor while I call the doctor.

BURNETT C. COLLINS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Doctor, are you a regularly licensed physician and surgeon in the State of New York?

A. Yes.

Q. Well, will you give us doctor, your experience and history, your medical history?

A. Well, I am a graduate of the Long Island College Hospital in 1894, and I have been practicing and specializing on the eye and ear for about thirty-two years.

Q. Are you attached to any hospitals?

A. Yes.

Q. What hospitals?

A. At the present time the Brooklyn Eye & Ear and the Swedish Hospital.

Q. Did you at my request, doctor, examine the plaintiff, Robert Cain?

A. Yes, sir.

[fol. 243] Q. Will you state what examination you made, and the date you made it, and what you found?

A. I was asked to examine his eyes. I did so in March, 1927. I found a good eye, I think that was the right eye. It was the left eye I found had a cataract. The man was blind in that eye.

Q. Were you able to tell from your examination whether the cataract was a traumatic or non-traumatic cataract?

A. No, I could not state what is was.

Q. Did you get the patient's history from him?

A. Yes.

Q. Did you form any opinion after hearing the patient's history, as to whether or not it was a traumatic or non-traumatic cataract?

Mr. Cuff: I object.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. Yes.

Q. What was your opinion?

A. That it was not traumatic.

Q. Will you please describe, doctor, a non-traumatic cataract?

A. A non-traumatic cataract is opacity of the lens due to degenerative disturbances in that region. Anything that will cause interference with the circulation and lymph supply or nourishment of the lens will cause that lens to become opaque, otherwise known as cataract.

Q. What are the possible causes of non-traumatic cataracts?

A. Any degenerative change. Any disease which will interfere with the nutrition.

[fol. 244] Q. Infection or things of that character?

A. Yes, sir, infections will do it.

Q. It has been testified here, doctor, that a cataract, a traumatic cataract may form without a rupture of the capsule of the lens. Do you agree with that statement?

A. No.

Q. Will you explain your reasons for not agreeing?

A. In any external violence, or transmitted violence or direct violence, the opacity of the lens produced by the union of the lens substance would aqueous fluid vitreous fluid, the aqueous fluid being the fluid in front of the lens and the vitreous fluid the fluid in back of the lens. Now, if the aqueous humor and the vitreous humor, now one of those substances comes in contact with the lens substance, the cataract which separates the two must be ruptured. There must be some contact through the lens capsule to produce this opacity.

Q. Would it be possible for the capsule of the lens to get in such a condition by reason of under-nourishment that there are aqueous humor or vitreous humor, the fluid to permeate the capsule, if the capsule was not broken?

A. They could not without a break in the wall.

Q. Well at the time that you examined Mr. Cain did he have any light perception in his left eye?

A. He did.

Q. How was his right eye?

A. His right eye was normal.

Mr. Wolfe: That is all.

[fol. 245] Cross-examination.

By Mr. Cuff:

Q. Now, doctor, just let me ask you this. A cataract is a smear over the eye, isn't it?

A. No.

Q. I mean to a person looking at it?

A. No, not at all, a cataract is not at all recognizable.

Q. No, I mean the appearance to a person looking at a person having a cataract?

A. No, no smear at all.

Q. It doesn't look like that, doctor?

A. No.

Q. Does a person having a cataract——

A. (Interrupting.) The average would not be able to distinguish it at all, not unless you took a lens and looked through it into the eye.

Q. Now, doctor, look at this man (Mr. Cuff causes plaintiff, Mr. Cain to stand). Is there any sign of cataract there, doctor?

A. I cannot see any evidence of cataract from here at all.

Q. Well, now here doctor (Mr. Cuff causes Mr. Cain to stand about five feet away from the doctor), how far away can you see some difference in those eyes now?

A. I can't tell it is cataract.

Q. Can you see a difference in the eyes?

A. They don't look exactly the same but I cannot tell you what is the matter with the man's eye.

Q. Can you see a difference in that man's eyes from where you are sitting?

A. Yes, a slight difference in the two eyes.

Q. That means a cataract in his left eye?

[fol. 246] A. I don't know.

Q. Didn't you examine him?

A. I don't recognize the man.

Q. You don't know whether or not that is the man?

A. No.

Q. Well, I will tell you that is the man that you examined, doctor?

A. All right, what of it?

Q. He is the plaintiff, and he has the cataract in his left eye.

A. Well, I am accepting your statement.

Mr. Cuff: Is there any question about this being the man that was examined, Mr. Wolfe?

Q. Just come here a minute, Mr. Cain. What kind of a looking man did you examine?

A. I don't remember the man at all. I don't know whether he was six feet tall or five feet tall.

Q. You might be talking about somebody else?

A. Yes.

Q. You don't know for sure whether the man you examined is this plaintiff?

A. No, I do not.

Mr. Cuff: I move to strike out the doctor's testimony.

The Court: What do you know about the man you examined, the name?

The Witness: The name, yes.

The Court: Who brought him to you?

The Witness: I can't tell you that. I was asked to examine a man by the firm of Hatch & Wolfe. I don't re- [fol. 247] member the man at all. I don't recognize him.

The Court: Do you remember when you examined him?

The Witness: By looking at my notes.

The Court: When?

The Witness: In March, 1927, but I can't remember a man from 1927 up to the present time.

The Court: Did somebody from the firm of Hatch & Wolfe come with him?

The Witness: I think they did, yes, sir.

Mr. Wolfe: I want to state, your Honor, that I was not present when the examination was made but we did call up Dr. Collins and told him that this man was being sent out.

The Court: Well, I can ask the plaintiff. Mr. Cain were you examined by Dr. Collins?

Mr. Cain: Yes, sir, and there was a big tall fellow with me.

The Court: Do you remember the big tall fellow, doctor?

The Witness: Was there a big tall fellow with you?

Mr. Cain: Yes.

The Witness: Well, I think I do remember something about it.

Q. Now, doctor, will you give us a little bit more assurance about the statements you are making here?

A. Well, I am not going to say anything I don't know. I don't know even now that this is the man.

[fol. 248] Q. Well, we are going to give you the benefit of that doubt, doctor?

A. Well, I think he is but I am not going to say positive.

Q. Now, have you got your notes here, doctor, that you made?

A. No, I have not.

Q. Have you looked at them today?

A. I looked at my report of the previous trial. They called me up today when I was doing something else and I did not have time to look at my notes.

Q. You did look, however, at what you said at the last trial?

A. I remember some but I don't remember all.

Q. Is that what you base your testimony on?

A. Yes.

Q. You have testified here today that there was light perception in the left eye?

A. So far as I remember there was.

Q. There was light perception?

A. As far as I remember there was, yes. I do not remember saying there was not.

Q. Did you get that out of your testimony there?

A. No.

Q. Well, if you did not say that at the last trial that there was light perception, why do you say it now?

A. I wasn't asked anything about it at the last trial, about light perception.

Q. Where did you get your statement and the information now that he had light perception on March 2nd, 1927?

A. I remember going over the case and I remember there was light perception. That is one of the questions we always ask a man. And we try on light perception.

Q. I am asking you you now where you got the informa-

[fol. 249] tion for the affirmative statement that you made that there was light perception?

A. In my examination.

The Court: You remember that?

The Witness: I do. I remember every case. There is nothing in the last trial about light perception.

The Court: You have not gone over your notes?

The Witness: No.

The Court: You say there is nothing in the last examination?

The Witness: Not to my knowledge.

The Court: Well, how do you come to remember that there was light perception?

The Witness: Because I examine every case. I remember well there was light perception. I remember that.

Mr. Cuff: I now ask the defendant if he has the report of Dr. Collins, and will he produce it?

(Report produced.)

Q. Now, doctor, in your previous examination you were asked "Will you state to the Court and Jury what examination you made of the condition you found at that time?

A. I was asked to examine his eyes."

"By the Court:

Q. That was last year, doctor?

A. 1927.

Q. 1927?

A. Yes. I was asked to examine his eyes and submit a [fol. 250] report. I did that. I found a cataract in his left eye. Just let me look and see that it is the left eye.

Q. You may look at your report?

A. The eye. The right eye was normal."

Did you say anything then about having light perception in the left eye?

A. Did I say that?

Q. Yes.

A. No, well, what of it.

Q. Now, you have testified exactly to the contrary now, doctor?

A. I have not. Nothing there about light perception whatsoever.

Q. You left it out the last time and put it in this time, is that it?

A. I was not asked the last time.

Q. You were not asked? Please doctor, just listen again while I read from the record of your last trial.

"Q. Will you state to the Court and Jury what examination you made and what condition you found."

Doesn't that include a complete statement?

A. No, that doesn't say anything about light perception.

Q. I just read it to you?

A. No, you did not.

Q. All right, I will read it to you again:

"I was asked to examine his eye and submit a report. I did that. I found a cataract in the left eye. Just let me look at my notes a minute and see if it is the left eye.

Q. You may look at the report?

A. The left eye, the right was normal."

Did you say anything about having light perception in the [fol. 251] left eye then?

A. It is evident I did not.

Q. But you volunteered that here today?

A. I did. I did not even volunteer it. I was asked it.

Q. Now, doctor, is not whether that man had light perception the most important part of your examination?

A. It is very important.

Q. Isn't it the most important thing?

A. No.

Q. Well, that is all a man has an eye for. He can see with it or he cannot see a thing without it?

A. You are all wrong.

Q. All right. It is very important anyhow?

A. It is part of the examination. I would have answered then if I had been asked it but to state that——

Q. Wait a minute, doctor, you say you were not asked it?

A. When?

Q. At the last trial under that question "What condition did you find there." You say that that question did not bring from you the answer "That there was a light perception"?

A. No, it had nothing to do with the examination whatsoever. You would ask what was the matter with the man and that is my answer.

The Court: You were asked the condition.

The Witness: Light perception has nothing to do with a cataract.

The Court: If you find light perception would your notes show it?

The Witness: No, not necessarily.

[fol. 252] The Court: If you found at the time of the original examination when you knew you were examinng for the lawyers, for the defendant, if at that time you found the man had light perception in the left eye, would that be in your notes?

The Witness: No. If he had not had light perception then I would have noted it.

The Court: It is assumed that he had if it was not in your notes, is that it?

The Witness: Yes, sir.

Q. Now, doctor, you were employed by Hatch & Wolfe, the defendant in this case, that is the attorneys for the defendant?

A. Yes. I am speaking here because of the noise.

Q. You go right ahead and talk loud, doctor, we are getting along fine. And you were brought into this case to examine this plaintiff, because he was making a claim against the steamship company, the employers and clients of Hatch & Wolfe?

A. I don't know anything about that. I was merely asked to examine him and to give a report.

Q. Did anybody connected with the defendant's office tell you that this plaintiff in his complaint made this claim "That by reason of said assault plaintiff sustained great bodily injury and shock and loss of vision of his left eye"?

A. Not to my knowledge.

Q. So when they told you to examine this man they did not tell you he had lost the sight of his left eye?

[fol. 253] A. No.

Q. And you didn't ask them?

A. No. I did not.

Q. He may have been blind in that left eye from birth and you would have gone ahead and diagnosed that condition?

A. I went ahead and examined the man and gave them the report.

Q. You went ahead without any object in view?

A. I don't know what the object was.

Q. You tell us now you were employed by these defendants to examine his eyes without having any specific thing to find there?

A. They did not tell me anything.

Q. They didn't tell you he claimed he lost the vision in the left eye?

A. The statement was that a man was to have his eyes examined and give them a report.

Q. You didn't examine his eyes under instruction?

A. Under no instructions whatsoever.

Q. You examined his eyes and gave them a report?

A. I said so three or four times now.

Q. Now, did you give a report as to how much he could see or how much he could not see?

A. That is right there before you, yes.

Q. Did you give them that report?

A. Yes.

Q. And you said that his right eye was normal, didn't you?

A. I did.

Q. But you said nothing about the left eye?

A. Yes, I did, of course I did.

Q. You said there was a cataract in the left eye?

A. Right.

Q. That doesn't mean anything, does it, in the way of [fol. 254] light perception?

A. It does. It says also that the man was blind in that eye. That is my report to them.

Q. You said that in your report to them?

A. Yes.

Q. But you qualify that now by saying that although he was blind in the left eye he did have light perception in the left eye?

A. It is not necessary to qualify what I did not say.

Q. I am only trying to harmonize your true statement, doctor?

A. No, you are not. You are trying to see if you can mix me up.

Q. I don't think I can do that any more than you have done it yourself?

A. Yes, go ahead.

Q. You said in your report he was blind in his left eye?

A. Yes.

Q. Now, you come to court and say he has light perception in his left eye?

A. Yes, sir.

Q. These are the same two things?

A. Yes.

Q. And in the last trial you mentioned nothing about having light perception in the left eye?

A. Well, the man is blind with light perception. That is the condition of this man or was when I examined him.

The Court: Just explain that.

The Witness: A man may be blind for all practical purposes. Now, you shut off the light. That is, you take and have that man in a darkened room and you flash the light in front of his eyes. You say, "Can you tell if there is light there." And the man says, "Yes." He has light perception but the man is blind.

[fol. 255] Q. And without consulting your notes you tell us that Cain told you when you flashed this light in front of him that he could see the light?

A. Absolutely, that is my statement.

Now, doctor, you say that in this case you were not able to determine whether the cataract was a traumatic or a non-traumatic at the time you examined him?

A. Yes.

Q. You say also, doctor, that in order to have a cataract form, there would have to be a rupture of the capsule?

A. No, a traumatic cataract.

Q. That is right, a traumatic cataract to form would have to be ruptured. Now, a blow that would cause a rupture, would not necessarily have to strike the eyeball, itself?

A. No.

Q. Concussion could bring that about?

A. Transmitted violence, yes.

Q. And if that capsule was ruptured you could not tell it by looking at his eye?

A. Not after the cataract was developed no.

Q. This was a fully developed cataract, wasn't it?

A. I could not tell. I have not made that statement.

Q. Well, would you recommend an operation on Mr. Cain's eye at this time?

A. Now, there is no——

The Court: After?

The Witness: If he has light perception now I would not.

Q. Two other doctors have testified that he has not light perception, and he has testified himself to that effect. [fol. 256] Under those circumstances would you recommend an operation?

A. If that is so, I would not.

Q. So if that is so, this man is permanently blind in that left eye?

A. Can't be sure of it.

Q. Well, if there is no operation?

A. Well, you can operate to find out.

Q. But if there is no operation blindness will continue, will it?

A. Certainly.

Q. So that the only way there could be any chance of his seeing would be by taking chances on an operation?

A. Yes, and it is a worth-while try.

Q. You would not recommend the operation at this time, would you?

A. Well, you could not make the man any worse. It is worth while taking a chance. I don't know why not.

Q. Let me read you this question at page 234 of the record of the last trial.

"Q. He would have to wear glasses, would he?

A. He would have double vision even if he had perfect results from his cataract operation he would be more uncomfortable than if he used the one eye as he does now."

Is that true?

A. That has always been my opinion.

Q. So in view of that statement, doctor, you would not——

A. The only thing is because he wants——

Q. The man can see now with one eye. If he is comfortable I would let him alone.

—. —

Q. Well, the man can see now except he only had one eye?

A. Yes.

Q. After an operation with a perfect result, he might see double?

[fol. 257] A. He would, positively.

Q. Do you say now doctor——

A. If the man wants to take that chance, that is the only reason.

Q. Would you recommend it?

A. No, I would not recommend it.

By the Court:

Q. What was there in the history that caused you to reach the conclusion that this was a non-traumatic cataract?

A. There is no evidence in the history to show he suffered from a blow, and in the history there was nothing related to find that the man was completely knocked out. You must have a severe injury. An ordinary bump on the head does not produce a cataract. A man must be unconscious and show some evidence of a severe injury. A man goes in a prize fight and gets knocked down he does not have cataract. It must be a severe blow on the head.

Q. Did he tell you anything about a severe blow?

A. I have no history of such. He said he was hit by something.

Q. By a monkey wrench?

A. I could not say the word monkey wrench. He said somebody hit him, somebody on the ship. I understand he was not laid up. He was not confined to his bunk.

Q. Did you determine that from what he said?

A. He told me that he was knocked unconscious, knocked completely out by that blow.

[fol. 258] Q. Was there anything in the history that would lead you definitely to say that it was a non-traumatic, or is it merely there was not sufficient in his statement about a knockout on the head to lead to believe that it was traumatic?

A. That is all that I have. As I said before you cannot distinguish between the two after they have developed. In earlier stages, if there is a history of injury you can find that a cataract started to develope forty-eight hours after the injury and then you have strong evidence to believe that that is traumatic cataract; but after a cataract becomes opaque that is after the light can enter that lens you have no way of determining of whether or not it is.

Q. Well if he had a blow in the region of the eye on this voyage, on February 6th, and you examined him on March 7th, the time would be too long for you to determine?

A. If it completely developed. A traumatic cataract can develope very rapidly. We have sometimes found a completely developed cataract twenty-four hours after.

By Mr. Wolfe:

Q. Was there any evidence that the plaintiff was suffering or had been suffering of uvieties?

A. No. I did not see anything.

Q. There was no evidence of that?

A. No.

Q. You have examined cases for Hatch & Wolfe?

A. Yes.

Q. We have never given you any instructions excepting to write a report, is that right?

A. That is all.

[fol. 259] Mr. Wolfe: That is all.

By Mr. Cuff:

Q. Did anybody give you any of the facts with respect to your examination of Cain?

A. Mr. Cain himself.

Q. Anybody else?

A. Not that I remember.

Q. Now doctor, would you swear that it was not Mr. Turner that gave you those facts?

A. No, I would not.

Q. You would not swear?

A. No. I always quiz the patient that comes in the office, never anybody that is with him.

Q. Well, just leave it this way. Will you swear that Mr. Turner did not supply you with those facts?

A. No. I will not. If the patient talks English I try to get him to answer, I try to get my information from the patient.

Q. That may be your usual rule but we are talking about this particular case.

A. I can't tell you.

Q. You cannot say whether you got the facts from Cain of from somebody else?

A. No, I don't know.

Mr. Cuff: That is all.

By Mr. Wolfe:

Q. It would not make any difference where you got your facts as to the diagnosis that you made, would it?

A. No.

Mr. Wolfe: That is all.

Mr. Cuff: That is all.

[fol. 260] MATTHEW PANKOR recalled.

Cross-examination.

By Mr. Cuff:

Q. Now, Mr. Pankor, did you have a talk with the captain about this trouble with Mr. Cain?

A. Yes, sir, I did, afterwards.

Q. You did tell the captain about it, did you?

A. Yes, sir.

Q. Do you know when?

A. Yes, the same evening, when he finished dressing—I mean that morning.

Q. Just a moment now. I read to you from page 292. Do you remember this question at the last trial:

"Did he ask you if you hit Cain?

A. No; when was that?

Q. Any time?

A. No, sir, I never had a talk with the captain about it."

Do you remember making that answer to the same question?

A. The captain asked me if I had any trouble with him and I told him no.

Q. All right. Now one of your firemen had a couple of black eyes on February 5th, didn't he?

A. I don't know.

Q. You don't know about that?

A. No, sir.

Q. Are you sure you don't know about that now?

A. Sure.

Q. Now, nobody told you anything about that?

A. A fireman got a black eye?

Q. Yes.

A. Nobody told me.

Q. Didn't you talk to the fireman about these black eyes?

A. I did not.

[fol. 261] Q. You did not?

A. I did not tell him anything. Nobody. Why should they talk to me about black eyes?

Q. Well, the firemen worked under you on the ship, didn't they?

A. Yes.

Q. And did you see them at all times?

A. No, not at all times. Different ports. I see them when they are on watch and when they are on board and don't go ashore.

Q. You never knew anything about one of your firemen having a black eye on February 5th?

A. No.

Q. No one ever told you about it?

A. Who was he to tell me anything?

Q. Nobody ever told you anything about it?

A. No, nobody told me.

Q. Do you recall at the last trial on page 303:

"You were told that he, the fireman, had a black eye, weren't you?

A. Oh, I was told."

Do you remember making that answer?

A. I don't believe everything I am told when anybody comes to talk to me.

Q. Well, I will read the next one to you and make it clear:

"Q. Who told you?

A. Who told me?

Q. I am asking you.

The Court: Wait a minute. Did somebody tell you.

A. Oh, somebody told me."

Do you remember making that answer?

A. Somebody talks, what have I got to do with that?

[fol. 262] Q. That is what you said didn't happen a moment ago and now you said nobody told you. Did you talk to this fireman about the black eye?

A. No, sir.
Q. Never mentioned it to him?
A. He never told me anything about it, I don't know.
Q. Well, now I will finish the last answer:

"Oh, somebody told me. I had a talk with him about — when I was ashore, but what have I got to do with that?"

Does that refresh your recollection?
A. I don't know the fireman was ashore.
Q. Isn't it a fact, Mr. Pankor, that Jackson is the man who blackened that other fireman's eye?
A. He did not tell me and nobody else did tell me nothing about it.

Mr. Wolfe: I object, your Honor, to any further cross examination about black eyes.

Q. Now you say that Mr. Cain told you that he tripped and fell. What did he say he tripped over?
A. He said he fell between a pipe covering and an oil tank cover.
Q. A pipe covering and an oil tank cover?
A. Yes.
Q. That is what Mr. Cain told you?
A. That is what he did.
Q. How he got his injury?
A. That is what he said. He fell somewheres between these pipes.
Q. On page 306 of the record of the previous trial, do [fol. 263] you remember this question?

"Q. Will you tell me what Cain told you about how he was hurt, if anything?
A. He told me he fell down. He was drunk. He fell down on a fuel tank."

And now you say an oil tank?
A. Well, that is a fuel tank. All tanks are fuel tanks.
Q. What about the covering that you said he said he fell over?
A. That is about that high (indicating) off the box. Anywhere from ten to twelve inches.
Q. That is right in the center of the deck?
A. No, sir, one side is a pipe line and the other side is a pipe line.

Q. Did you stand your four to eight watch on February 5th?

Mr. Wolfe: Morning or afternoon?

A. No, not exactly from four to eight. After supper I started to work on the watch.

Q. That is, you did not stand your four to eight watch in the afternoon of the 5th of February?

A. No, not from four to eight. After supper I started working on the regular sea watch.

Q. That wasn't any particular requirement on that boat for a man to commence his watch on time? You got started when you felt like it?

A. No, sir, not that way.

Q. When did you start work on February 5th?

A. From eight in the morning until half past one in the afternoon. I started work after supper until one o'clock in the morning.

[fol. 264] Q. Did you make all the repairs needed in the engineroom to get the ship under way?

A. Yes, sir, at every port.

Q. Did you on this trip?

A. Yes, sir.

Q. That is where you were from eight in the morning until after one o'clock the following morning?

A. Yes.

Q. And when you left there in the afternoon of February 5th everything was ready for sailing? All repairs made had been completed?

A. They were all done.

Q. Did you ever go out with Mr. Woodbury, ashore?

A. That is the first time I ever did, in Venezuela.

Q. The first time you ever went ashore?

A. With the captain, and the captain's wife.

Q. You only went once in Venezuela?

A. Yes.

Q. That was on the afternoon of February 5th?

A. Yes, sir.

Q. Now do you agree with Woodbury that when you went out with the captain you continued walking all the time, you did not go in any place?

A. We went in a store.

Q. Did you have anything to drink?

A. No, sir.

Q. Nothing to drink at all?

A. No.

Q. Did you ever have anything to drink on the boat with Mr. Woodbury?

A. No, sir, I don't drink on the boats.

Q. But in the presence of Mr. Woodbury did you have anything to drink?

A. No, sir.

Q. Were you ever out on a party with Mr. Woodbury?

A. I don't go out on parties with anybody.

[fol. 265] Q. Now, Mr. Woodbury has testified that he saw you drinking whiskey. When did he see you drinking that whiskey?

A. Nobody saw me drinking whiskey.

Q. He said this morning that he did see you take a drink of whiskey.

A. He did not, or nobody else ever seen me take a drink of whiskey, because I don't drink whiskey.

The Court: He said liquor, didn't he?

Mr. Cuff: Yes, but we brought out that by liquor he meant whiskey.

Q. He never saw you take a drink of whiskey?

A. Well, sometimes, I admit, I may take a glass of beer or so, but not all the time.

Q. Did you ever take a drink of whiskey in your life?

A. Yes, in my life.

Q. Several times?

A. Well, maybe once or twice, that is about all.

Q. Mr. Woodbury must have been with you on one of those occasions if he has been telling the truth?

A. I do not drink with nobody, nobody on the boats.

Q. Now when was the first time that you told anybody that Mr. Cain laid in bed, the sight gone from his left eye, and read that statement supposed to be signed by him?

A. I don't quite get you right this time.

Q. When was the first time that you told anybody that Cain signed the statement, read the statement that you said [fol. 266] was signed in your presence?

A. I can't remember that exactly when I said anything about that.

Q. Well, did you tell it to anybody on that boat?

A. I may have.

Q. Did you tell it to the attorneys?

A. I am not sure whether I did or not. I had a talk with the chief engineer about that.

Q. Can't you tell us the first time?

A. I can't remember.

Q. Did you make out a statement of what you knew about this, for the steamship company?

A. I did not make any statement.

Q. You didn't sign any statement or anything?

A. Well, when I came on the ship I signed the articles.

Q. No, I mean about this injury, a statement about this injury coming to Cain?

A. The statement the chief engineer made between me and the chief.

Q. Did you make a statement just as you say?

A. Made between Mr. Miller and Cain.

Q. You made one?

A. No, the chief engineer.

Q. Did you sign one?

A. No, Cain signed it.

Q. Did you sign one in addition to the one Cain signed?

A. I did not sign it.

Q. Now before you went on the witness stand this week, did you tell anybody that you saw Cain leave the stateroom?

A. If I saw Cain leave the stateroom?

Q. Yes, did you tell that to anybody this week, within the past seven days?

A. No, except here.

[fol. 267] Q. Do you know, Mr. Pankor, you didn't say anything about that at the last trial?

A. I haven't been around since the last trial.

Q. But at the last trial you didn't say anything at all about that, did you?

A. I don't know what I said about that.

Q. Well, you can't remember whether or not you did say it or not, can you?

A. I seen it when Cain signed it.

Q. Isn't it a fact you never told your lawyer anything about that at all after the last trial?

A. About that statement?

Q. Yes.

A. No, sir, I never spoke to anyone at all.

Q. Did you speak to him after the last trial about it?

A. No, I don't think so.

Q. Because, when you went on the witness stand here——

A. Since I left here the last time nobody seen me in New York.

Q. You never mentioned to anybody that you saw Cain sign that statement?

A. I do not remember doing anything like that.

Q. Do you mean to tell me that you never mentioned to anybody that you did not—I withdraw that. I mean did you tell your lawyer on Saturday or yesterday or today that you saw Cain sign that statement?

A. No, sir.

Q. He has not seen you since the last trial?

A. When I came in here last Thursday.

Q. You didn't deny you did not mention anything about it to anybody, you don't deny that, do you?

A. I never spoke about it to nobody.

Q. Now did you lose your job at the end of this same [fol. 268] voyage with the Alpha?

A. No, sir, I did not lose it, and I got off.

Q. You left?

A. Yes, I went back to the Gulf Refining Company.

Q. You left the Alpha, did you?

A. I did.

Q. Do you know the name of the man who took your place on the Alpha?

A. No, sir.

Q. You say you just resigned your job, do you?

A. Yes.

Q. Are you sure about that, Mr. Pankor?

A. I surely did.

Q. Isn't it a fact that when the boat came into New York you left the boat and you did not come back for about three days, and when you did you found the company had hired another man to take your place?

A. Do you want me to tell the truth about it?

Q. Yes.

A. Well, Mr. Miller was sick and he wanted me to take his place, and Mr. Daly got another man, so when the chief engineer comes aboard, Mr. Miller he says—well, say—how at this time there was a new ship coming out by the name of the Gulf Bride, she is a motor ship. He says why don't I stay on this ship, and I says I don't want to stay here. I will get on the motor ship. I says I was working for these people for four years before. So I went over and I went over to Jersey and I was there for somewheres around a week or so, and one day Mr. Daly telephoned me he wanted me to come up and take the job, and I says no, I will not go back. So when I came up to the ship that is supposed to sail and it is supposed to sail on Monday and he asked me [fol. 269] to take the job, he says, he says, I have got a man, but he says, I would like you to come up and take the job, but I says no, I wouldn't take it, I was going on the motor ship.

Q. You don't deny that you left the ship and you were gone about three days, do you?

A. I had three days off.

Q. And then you came back and found another man working in your place?

A. How could I find another man when I did not have my clothes off the ship? My working clothes were all there. I could not take them all off at one time.

Q. Now, Mr. Pankor, do you know the reason why the boat didn't sail at seven P. M. on February 5th.

A. Didn't sail?

Q. Yes, do you know the reason?

A. Yes, sir, partly.

Q. What is the reason?

A. Well, the captain sent his papers ashore, his clearance papers, to be signed, and he was waiting for the papers, for the clearance papers.

Q. Waiting for the clearance papers?

A. Yes.

Q. Now I will read the question to you and ask you——

A. That is what the captain said, I don't know about the papers, but the captain is the master, and that is what he told me later on.

Q. Well, what reason do you know, yourself?

A. Well, as I told you, he told me that later on.

Q. Well, I will read to you from page 300 and I will ask [fol. 270] you if this question was asked at the last trial:

"Q. The boat was to go out and leave the chief engineer ashore?

A. That is the reason the boat did not go out. Half the crew were ashore."

Do you remember making that answer?

A. Half the crew was ashore?

Q. I asked you if you remember making that answer?

A. The chief went after some of them probably.

The Court: He is asking you whether that question was put to you at the last trial.

The Witness: Probably it was.

Q. Is it probably true?

A. Probably true. The chief engineer went ashore, but he could be any time abroad if he was anywheres around. The ship always blows the whistle a half hour or so before she is due to sail.

Q. The reason the ship didn't sail at seven o'clock is because the captain could not get a crew on the boat, is that right?

A. Some of them was ashore.

Mr. Cuff: That is all.

By Mr. Wolfe:

Q. Now you got your Diesel license, did you?

A. Yes, sir.

Q. Will you hold up your right hand?

A. Yes.

[fol. 271] (Witness hold up right hand, exhibiting about two fingers left on hand.)

Mr. Wolfe: That is all.

Roy R. Jackson, called as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Mr. Jackson, what is your occupation?

A. Marine engineer.

Q. What licenses do you hold?
A First assistant.
Mr. Cuff: I object to that.
The Court: Objection overruled.
Mr. Cuff: Exception.

Q. How long have you had a first assistant's license?
A. Since November 10th, 1927.
Q. Prior to that did you have a second assistant's license?

Mr. Cuff: I object.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. Yes, sir.
Q. How long have you been going to sea altogether?
A. Eleven years.
Q. Were you on the steamship Alpha on February 6th and 7th, 1927?
[fol. 272] A. Yes, sir.
Q. What was your position on board the Alpha?
A. Second assistant engineer.
Q. That was the only voyage you made on the Alpha?
A. Yes, sir.
Q. Do you recall the morning of February 6th, 1927? The morning of the 6th?

The Court: The morning of the 5th.
The Witness: Yes, sir.

Q. Will you tell the Court and jury what you did from the morning of the 5th of February, until the afternoon of the day, if anything?
A. Well, I went ashore on the morning of the 5th.
Q. What time did you go ashore?
A. Oh, around nine o'clock.
Q. Who went with you?
A. I went by myself.
Q. What did you do on shore?
A. Oh, doing a little walking up and down the beach. I had a couple of bottles of beer and I came back to the ship at eleven-thirty.
Q. At eleven-thirty?
A. Yes.
Q. Well, then, what did you do?

A. I got my lunch and I went to work around twelve o'clock.

Q. What did you go to work on?

A. In the boiler room.

Q. What did you do in the boiler room?

A. Odd jobs.

Q. How long did that work take?

A. That was off and on until two o'clock in the morning of the 6th.

[fol. 273] Q. By whom are you employed now?

A. By the Pureoil Steamship Company.

Q. And what ship are you on?

A. The W. W. Mills.

Q. How long have you been with the Pureoil Steamship Company?

A. Fourteen months.

Q. And you are going back on the W. W. Mills, after the completion of this trial?

A. Yes, sir.

Q. Were you ashore on the afternoon of February 5th at any time?

A. No, sir.

Q. Are you positive about that?

A. Yes.

Q. What was your condition on the afternoon of February 5th, drunk or sober?

A. Sober.

Q. Positive of that?

A. Yes.

Q. There is testimony here from Mr. Stewart, I believe, that he saw you sitting in the after part of the vessel on the afternoon of the 5th in a drunken condition. What do you say to that?

A. I was not.

Q. It has been testified to here by the plaintiff that you assaulted him and hit him with a wrench on the morning of the 6th about one A. M.?

A. I did not do it.

Q. Describe for the Court and jury exactly what occurred on the Alpha from the morning of February 6th, from one A. M.

A. Well this man came, that was supposed to go on watch at ten o'clock. He already had missed one watch

and he was supposed to stand watch in the afternoon of the 5th. He did not stand that watch. Well, when twelve o'clock came on the 6th, Cain did not come down to stand [fol. 274] watch. I had a fireman there that had been on watch since four o'clock in the afternoon, so I sent that fireman up around 11:25 to call Cain, that is, a half hour before going on watch, to make sure that he was up, and he told me that Cain would not work, that he was intoxicated. I came up myself.

Mr. Cuff: I move to strike out the answer as not responsive.

The Court: Motion denied.

Mr. Cuff: Exception.

A. (Continuing:) I got up myself and awakened Cain and he gets up. He was drunk of course, but I figured that after he had a cup of coffee or some ice water in him, he would be all right. At twelve o'clock I dismissed the fireman that had been on watch from four in the afternoon until then. Around twelve-forty Cain had not shown up. The ship was then supposed to go out as soon she had finished loading. I looked up on the top grating and saw Cain, the second grating it was, and I saw the first assistant and Cain arguing, I don't know what that was all about, or what they were saying. The first assistant came down and told me that Cain was intoxicated and would not come down below.

Mr. Cuff: I move to strike out what the first assistant told him.

The Court: The motion is granted.

Mr. Wolfe: Exception.

Q. What did you do?

A. Well, I went up with the intention of getting another [fol. 275] fireman, of getting a wiper and putting him on as a fireman until this man got into a condition to go to work, and all the way up to the top this man Cain he had his head in the port engine room door. I hollered to him to come on down. He did not come on down, and by the time that I got up I was ten or fifteen feet away. He had fallen down and was getting up. I hollered to him to stop. He would not stop. I followed him on around the housing, and in the center of the poop deck housing, right in the center, he fell down again.

Q. What did he fall over?

A. Well, there are several things, like skylights, an anchor, and so forth, that he could have fallen over. Well, anyhow, as I ran on around the corner housing, he was going around, staggering around. I did not try to catch him, because I had an ingrown toenail and I only had half a shoe on at that time. I followed him around the starboard side of the engineroom, and there was a fellow by the name of Stewart, and another fellow, a wiper, sitting there, right by the engineroom door, and I hollered to these two fellows to stop Cain. I asked them what was wrong with this guy, was he drunk, crazy, or what. They did not know. They went forward with me to the fieman's forecastle to look for Cain, and in the meantime he was running on the deck on the starboard side. He was falling down and had fallen down half a dozen times, amidships, so me, Stewart, and the wiper, we went to the firemen's [fol. 276] forecastle, and he was not there. We came back to the amidships housing again, the expansion deck. There are rooms down in those quarters and I went down to look for him. In the meantime I seen the pumpman and I asked him if he saw the fireman.

Mr. Cuff: I move to strike all the answer out as not responsive.

The Court: Strike out that part wherein he has a conversation.

The Witness: I went on the port side of the ship in the same position, and I looked there again and he was not there. Then I came back to the saloon and I went into the salon and there Cain was lying on the deck in the salon, stretched out, with blood on his head and on his face. I got a container of ice water and I threw it on Cain, and I took a towel and wiped his face, tried to wipe the blood from his face.

Q. Who was there at that time in the salon?

A. There was one sailor there, I do not know his name. Then I got Cain and I sat him on a chair on the portside, and about that time the captain came in with some bandages and so forth and fixed up Cain's head, but in the meantime I did not know where Cain was. I did not know where he was until I found him in the salon, but he had

already been to the captain in the meantime. During that time I was looking all around for him, but I could not find him.

Q. Did you at any time hit Cain in the eye with a wrench [fol. 277] or any other object?

A. No, sir, I had no cause to hit him.

Mr. Cuff: I move to strike out the latter part of the answer.

The Court: Strike it out, wherein he says he had no cause to hit him.

Q. Did you hit him, yes or no?

A. No.

Q. Are you right handed or left handed?

A. Right handed.

Q. Now at the time that you saw Cain poking his head in the port engineroom door, did Cain have any evidence of an injury to his face?

A. Not at that time.

Q. You never got up to him at all?

A. No.

Q. And when you next saw him in the salon, he had these bruises and cuts, is that correct?

A. Right.

Q. How many times did you say Cain fell down?

A. I presume seven or eight times.

Q. Well, what obstructions are there on the deck when you get around to the starboard side from the portside, aft?

A. Well, there is a sklight right in the center of the ship, and the poop deck aft.

Q. Well, will you describe the sklight?

Mr. Cuff: I object. That is greatly speculative.

The Court: Was he in sight all the time?

The Witness: It was dark. I could see him running though.

[fol. 278] The Court: Could you see him falling?

The Witness: Yes.

The Court: You saw him falling six or eight times?

The Witness: Sure.

Q. Do you know what he fell over?

A. Barrels and so forth. He tripped over the forms on the pipe covers.

Q. Do you know a drunken man when you see one?

A. Well, lots of times a man drinks and he is not drunk.

Q. I asked you if you know a drunken man, if a man is drunk? Can you tell an intoxicated man when you see one?

A. Yes.

Q. Was Cain intoxicated or sober?

A. He was intoxicated.

Q. Now Cain has testified that he cannot work as a fireman any more because of the fact that the sight of his left eye is missing. Will you state whether or not a fireman must have both eyes?

A. Absolutely.

Q. Has Cain become incapacitated by virtue of only having the sight of one eye?

A. Sure, he can work aboard a vessel.

Q. He can work?

A. Sure.

Q. Any doubt about that?

A. None whatsoever.

Q. Did you ever see a one-eyed fireman?

Mr. Cuff: I object to that.

The Court: That is overruled.

Mr. Cuff: Exception.

A. Absolutely.

[fol. 279] Cross-examination.

By Mr. Cuff:

Mr. Wolfe: Just a minute, I would like to ask one more question.

By Mr. Wolfe:

Q. Were you drunk or sober?

A. I was sober.

Cross-examination.

By Mr. Cuff:

Q. You are employed by the Pureoil Company?

A. Right.

Q. Who, connected with the Pureoil Company, told you to report here in connection with this trial?

A. What is that?

Q. I say who is it connected with the Pureoil Company that told you to report here for this trial?

A. The superintendent of the Marine Department.

Q. When did he tell you to come up?

A. On the 23rd.

Q. You have not got any subpœna, have you?

A. No.

Q. So then you came up here because the superintendent of the Pureoil Company told you to come up?

A. Yes, and to protect my name.

Q. Now were you the man who punched the other fireman that had the black eye on the ship?

A. No.

Q. Well, you saw his black eyes?

[fol. 280] A. I did not take any particular notice. I took no peculiar notice about it. I don't know, I might have.

Q. Just a fireman having a black eye or so isn't of any concern, is it?

A. That is customary.

Q. It is customary for firemen to have black eyes?

A. Sure.

Q. Well, how about a fireman having one eye put out, is that customary?

Mr. Wolfe: I object.

The Court: Objection overruled.

Mr. Wolfe: Exception.

A. Why, I don't know. Lots of people get hurt. That is nothing. I am liable to get my leg cut off.

Q. You were working down in the boiler room all the afternoon of February 5th, weren't you?

A. Yes, pretty much all afternoon.

Q. When is your watch?

A. Well, I have no watch in port.

Q. Now just tell me what is your watch.

A. The sea watch is when——

Q. Well, if you have any one in port at all, what is it, or if you have no watch, when do you have this so-called sea what, what is it?

A. Well, you have a watch when you go to sea, you have certain watches to stand.

Q. Well, don't make such a secret about it. When is your watch?

A. Twelve to four.

Q. That is the same as Cain's watch?

A. Yes.

Q. That means from twelve noon to four in the after-
[fol. 281] noon and then you are through?

A. Well, from twelve midnight until four in the morning.

Q. I know, but now we are talking about the afternoon of February 5th. Now you have told us you don't have any watch at all in port?

A. That is the engineers.

Q. None at all?

A. No.

Q. That means that you can go off the boat when you want to, and come back when you want to?

A. Yes, as long as there is one engineer aboard the ship.

Q. Yes, you can do anything you want to?

A. Yes, sir.

Q. Now you have heard the testimony here advanced by the plaintiff that on February 5th, you and a number of your associates, were out all the night over February 4th?

A. February 4th?

Q. Yes, you left the boat the afternoon of the 4th and did not come back until you came back on the afternoon of the 5th?

A. I was not out——

Q. You heard that testimony?

A. Yes, I believe I did.

Q. Well you heard the testimony that you were all drunk, both Cain and Stewart said so?

A. Yes, I heard that.

Q. Now you tell the jury instead of being drunk you were working in the boiler room all that day, February 5th?

A. Not all day. From the afternoon until five o'clock——

Q. From eleven-thirty on?

A. From twelve o'clock. Around twelve.

Q. You started to work?

A. Yes.

[fol. 282] Q. And you continued to work until how late?

A. Around two in the morning; when I finished I think it was about two in the morning.

Q. Until the following morning two o'clock?

A. Yes.

Q. Well, now, there was no obligation for you to do that work at all, was there?

A. Why, absolutely. The ship has got to sail. The boilers have to be ready.

Q. Yes, but here are three engineers, aren't there, the first assistant, the chief, and the third, isn't there?

A. Yes.

Q. Well, according to your story, this job had to be done in order to have the boat ready to sail at seven P. M., and you were doing it all yourself?

A. Well, a certain engineer has a certain plan to look after, that is a certain duty.

Q. Well, although there are those four persons, however, to do the work, you were doing it all alone?

A. I was doing it, because it was the boiler work.

Q. All alone?

A. All by myself.

Q. And you say you started on that job about twelve noon, and continued until midnight, and then right on past midnight until two in the morning?

A. Yes, sir, off and on.

Q. And did you take the boilers apart?

A. That is a little bit impossible, you can't very well take the boiler apart.

Q. Well, you can take some part of it apart, can't you?

A. Not necessarily.

[fol. 283] Q. Well, what were you doing?

A. Well, I was rolling a few tubes.

Q. You were rolling a few tubes?

A. Yes.

Q. All right, what else? Maybe it will be something that we know about,

A. Well, I was filling the boilers up, surface blowing them, water blowing them, and getting them ready.

Q. Filling the boilers and emptying them?

A. Not emptying them, just slowing them down. And then we did a little work on the fuel pump.

Q. Is that on the boiler?

A. Oh, yes.
Q. How much work did you do on that?
A. I don't know, a coupe of hours.
Q. Well, what else now did you do?
A. Well, I sounded the fuel oil tanks.
Q. You sounded the fuel oil tanks?
A. Yes, sir, and I sounded the fresh water tanks.
Q. And what is sounding the tanks?
A. Well, getting a gauge as to how much oil you have.
Q. Just looking at the gauge?
A. No, I said gauging them.
Q. Well, what does that mean?
A. That all takes time.
Q. Well, what did you actually do?
A. Well, you take a rod and you sound your tanks, there is a top——
Q. You mean you put a rod in and see how far up the oil comes?
A. Absolutely.
Q. How long does that take you?
A. Well, maybe half an hour.
Q. Well, what else?
A. Well, I can't recall every little thing I did, but it occupied my time for about fourteen hours.
Q. What was the biggest job?
[fol. 284] A. Rolling the tubes.
Q. What does that mean?
A. That means expanding them.
Q. Well, just tell us what you mean by expanding the tubes?
A. Well, where you have a tube expander——
Q. Did you put that in, or did you put it on top of it, or hit or what did you do?
A. Well, you put it in a tube, and then you have a pin that goes in the expander, and then you roll the tubes in case they are leaking.
Q. That was your biggest job?
A. Yes, it was the hardest job.
Q. How long did that take you?
A. Oh, about four or five hours.
Q. Pretty hot job, wasn't it?
A. Oh, yes.

Q. And you went right past your allotted eight hours for a day's work, what is a man's day's work in port, and you kept right on working?

A. That is not an ordinary day's work, eight hours.

Q. I said an ordinary man's day's work in port?

A. No.

Q. Well, you went right on working past your watch hour then?

A. I had no watch period. I was going to be aboard ship anyhow so I may as well do something.

Q. Do you insist on telling us there is no watch for a ship in port?

A. For engineers, there is not.

Q. Well, were you in court when Mr. Woodbury was on the stand?

A. Yes.

Q. Did you hear him repeatedly testify that he had an understanding with you to stand his watch on February 5th, did you hear him say that?

[fol. 285] A. Yes.

Q. Well, then, you have a watch?

A. Maybe he thinks so. Woodbury is a new man.

Q. According to your idea, Woodbury did not need to come to you and ask you to stand his watch?

A. Absolutely not.

Q. Now do you realize that you were on the Alpha for one trip?

A. Sure I was.

Q. And do you realize that Woodbury was on the Alpha for many trips?

A. That doesn't matter.

Q. And you know more about the Alpha as to how it is run than he does?

A. I was second assistant.

Q. Well, you know more about it than the man who has been there longer than you have?

The Court: Isn't that being repeated?

Mr. Cuff: I am afraid it is, your Honor?

Q. Now, when you were doing all this work down in the engineroom, did you have in mind that the ship was going to sail at seven o'clock that night?

A. Probably would sail.

Q. And these repairs were necessary, that you were making?

A. Why, yes.

Q. You did not call for any help at all?

A. Didn't need it. *Q.* This was only one boiler.

Q. Now, if the crew had been on the boat and it had been ready to go out at seven o'clock you could not have completed the work which you did complete?

[fol. 286] A. I had two boilers ready.

Q. No, I say you could not have completed the whole job that you did complete?

A. Sure, I absolutely could.

Q. Well, you say you could have done in the time to leave, at seven o'clock, this work that took you until two o'clock to do?

A. What is that question?

Q. Well, now, I say that you could have done in time to leave at seven o'clock, this work that took you until two o'clock to do, you could have had that done by seven o'clock?

A. I could not.

Q. Well, if the boat was to leave at seven o'clock, you could not have done all the work that you did on February 5th——

A. Sure, because the boat was going to pull out, that doesn't make me stop work.

Q. Well, you could have worked right on with the boat going?

A. Probably I would have.

Q. Now, Mr. Jackson, isn't the story about doing fourteen hours work just made up in your mind to account for your time on February 5th?

A. I am under oath, ain't I?

Q. Yes, you are.

A. Well, what I say is correct.

Q. Did you ever work thirteen hours at a time in port?

A. I worked as long as thirty-six hours at a time.

Q. In port?

A. Yes, sir.

Q. With three other engineers laying around?

A. Yes.

Q. You like to work, don't you?

A. Well, you have to work in this world.

[fol. 287] Q. Well you were not in such a kindly frame of mind about midnight that day, February 5th, were you?

A. Frame of mind, how do you mean?

Q. Well, you were not very kindly disposed, you did not feel cheery around midnight, did you?

A. I was tired, of course.

Q. Now, you sent a fireman up to call Cain, you said, at eleven-thirty?

A. About that, it was eleven-twenty-five, perhaps.

Q. Do you always send somebody to call a fireman who is to some on watch?

A. That is their duty.

Q. Whose duty, the fireman's or yours?

A. Either one, it does not matter. The fireman is supposed to call the other watch at twenty minutes before the hour.

Q. You say this fireman was dismissed by you at midnight?

A. Yes.

Q. You say also that you went up and called Cain yourself?

A. Yes, I guess so.

Q. Well, now, are you sure about that?

A. Absolutely.

Q. And you went right into the bunk with him?

A. I went by myself a few minutes later, around twenty minutes to twelve.

Q. Right into the bunk?

A. Yes.

Q. Well, now, on your direct examination, your statement was that Cain did not come down, "So about eleven-thirty I sent a fireman up to awaken him."

A. Well, he was supposed to come down at twelve o'clock.

Q. But you said on direct examination Cain did not some down and that eleven-thirty I sent a fireman up to [fol. 288] wake him?

A. Well, there is a mistake somewhere.

Q. You don't remember having said that?

A. I remember sending the fireman up.

Q. You don't remember Cain did not come up?

A. At twelve o'clock, no.

Q. Now, you know Cain was not due until twelve?

A. Yes.

Q. Well now, from this top grating down to the engineroom which way does the staircase run, fore or aft?

A. Aft.

Q. Then there is a rail or little passageway clear across the boat, isn't there?

A. From port to starboard.

Q. Then from there you go down another ladder, don't you?

A. Yes.

Q. And down below there what do you come to?

A. The platform.

Q. And then the staircase with the platform?

A. It is a floor place?

Q. And then the direction is just the opposite as you come down?

A. Yes.

Q. And then you are on the platform in front of the engineroom?

A. You are on the engineroom platform.

Q. And as you look over the staircase, the first one, you look to your left, for instance, what do you see when you look down?

A. Everywhere.

Q. From any one of them?

A. From the top.

Q. From the top?

A. Well, you can see the engineroom, just part of the engineroom, that is all, the after part.

[fol. 289] Q. You can see the engine?

A. From the top.

Q. When you are looking up you can see people standing on the second grating, can't you?

A. Yes, from a certain position in the engineroom you can, not at all points.

Q. You just happened to be in that position and you were able to see, weren't you?

A. Oh, yes.

Q. So from your position down in the engineroom you looked up and saw Pankor and Cain on the second grating just below the top?

A. The middle granting between the first and third.

Q. And you saw them there plainly?

A. Yes, it was about fifty feet, I guess, maybe forty feet.

Q. Now, after, did you see some talk by Cain and Pankor; did Pankor come downstairs

A. Yes.

Q. When he came downstairs Cain did not some down with him?

A. No.

Q. Well, you had dismissed the other fireman, hadn't you?

A. Absolutely.

Q. And you were without a fireman?

A. Yes.

Q. And your boat was to sail at six in the morning?

A. Not at that time, no.

Q. Well what time was the boat to sail?

A. Probably we would sail around two o'clock.

The Court: You mean in the morning?

The Witness: Yes.

Q. So that at half past twelve, or one, you had no fire-[fol. 290] man and your boat was to sail maybe in an hour. No fireman at all?

A. Yes.

Q. So after talking to Pankor you went upstairs?

A. Yes.

Q. And you were going to get someone to help?

A. I was going to get the wiper.

Q. Someone to come down and work there in place of Cain?

A. I was going to get the wiper.

Q. Well, a wiper is not a fireman, is he?

A. No, but I was going to put him on the job.

Q. In the place of Cain?

A. Absolutely.

Q. Well, when you went down to awaken Cain you found that he was sober enough in your opinion, so you told him to get up on the watch?

A. I figured that after he got a cup of coffee, after he had had a chance to get a cup of coffee and some ice water he would be sober enough to stand his watch.

Q. Well, when you woke him up he seemed sober enough, didn't he?

A. Oh, he was a little groggy.

Q. At the last trial you made the statement: "He seemed sober enough to go on his watch at that time."

A. Which he did.

Q. You thought so, didn't you?

A. Yes, at that time.

Q. That is at twelve-forty?

A. No, eleven-forty.

Q. Well, now did you say he got some more to drink between eleven-forty and twelve-forty?

A. He could have, I don't know.

Q. Well, do you tell the jury now that he did?

[fol. 291] A. That he did have?

Q. Yes.

A. I can't swear to that.

Q. Well, do you say now that he got drunker from the time that you saw him in his bunk until the time he came down to the engine room?

A. He seemed drunker, yes.

Q. Was he in any working condition when he came down?

A. From the position I saw him at that time, it was fifty feet away, maybe twenty feet, and he looked to be pretty drunk, but he was able to navigate.

Q. By the way, did you make any report about Cain's condition to the captain of the boat?

A. Did I make a report to the captain of the boat?

Q. Yes.

A. Why, he was already up at the captain's quarters at that time. There was no need.

Q. Did you tell tell the captain about Cain's condition?

A. About the condition here?

Q. No, about being drunk.

A. Afterwards, yes.

Q. You told him all about that?

A. I told him the man was intoxicated, and I was only going to see what was wrong with him.

Q. Now when you got upstairs to the top flight of stairs leading from the engineroom to the deck, you say you saw Cain and proceeded to the engineroom housing?

A. Yes.

Q. And you say he started runing?
A. Yes.
Q. An he fell?
A. Yes.
Q. How far is it from the top of the stairs, the grating, to the door?
A. Well, about eight feet.
[fol. 292] Q. And you were perfectly sober?
A. Absolutely.
Q. And are you a pretty good runner, Mr. Jackson?
A. Had a bad foot at that time and I did not run. I had been working.
Q. You had a bad foot?
A. Yes.
Q. Couldn't run very well?
A. Yes, but I would not take any chances of damaging my foot, because he was a little bit intoxicated. I did not know the man was going to hurt himself at that time.
Q. You don't recall telling the jury in the previous case, the jury themselves—one of the jurymen, asked you why you didn't catch up to Cain?
A. Yes, and I told him I was tired.
Q. You didn't say anything about a lame foot?
A. No.
Q. This is some new idea of yours, why you did not overtake Cain?
A. That is not any new idea, I just didn't have time to think of it.
Q. You could not expect anybody else to think of your sore foot, could you?
A. No.
Q. You would be the only one likely to think of that?
A. Yes.
Q. And when the juryman asked you why, you said you were tired, is that it?
A. I absolutely was tired.
Q. Now when you were about eight feet away from Cain he fell?
A. No, from the port engine room to the door, I says.
Q. Well, he fell right at the door?
A. No. When I got to the door he was twenty feet away, picking himself up.

[fol. 293] Q. And then he was twenty feet away from you?

A. Yes.

Q. And was he very drunk?

A. Staggering. I know he was drunk.

Q. He was falling because he was drunk, wasn't he?

A. I presume so.

Q. Will you tell the Court and jury what you were running after this man for?

A. I was going to see what was the matter with him. I was going to take him and put him in his room and keep him there. Maybe he would jump overboard.

Q. Is that the first fireman on the boat that you saw that was drunk?

A. No, we have put lots of them in irons too.

Q. That is not the first man you saw drunk, is it?

A. No.

Q. Are you serious when you just told the jury under oath that you thought that he was going to jump overboard?

A. Well, he could have.

By the Court:

Q. Did you think that at that time?

A. I don't know whether I thought that at that time or not.

By Mr. Cuff:

Q. You know you didn't think of that, don't you?

A. I thought he could have hurt himself.

The Court: He is only asking you what was in your [fol. 294] mind at that time.

The Witness: I did not think that he would jump overboard.

Q. You just told that to the jury.

A. I says he might have, I did not say he was going.

Q. You didn't think of that at all?

The Court: He also is asking you what you were thinking of at that time when you were running.

The Witness: I was going to catch him.

The Court: Why?

The Witness: Because the man was acting crazy, running from me for absolutely nothing, I hadn't done anything to the man, I had not done the man any wrong.

Q. Running from you?
A. Yes.
Q. And you were running after him?
A. I was not running, I was walking.

The Court: Well, if he was twenty feet away from you running, and you were walking, how did you expect to ever catch up to him?
The Witness: He was about sixty feet away from me.
The Court: I am trying to get what was in your mind at that time.
The Witness: I was going to follow him up to the forecastle.
The Court: By the way, what was in your hand at the [fol. 295] time?
The Witness: A flashlight and a pair of gloves.
The Court: What kind of gloves?
The Witness: Working gloves.
The Court: What were you doing with working gloves?
The Witness: Well, you know we have some hot places to grab ahold of down there.
The Court: Hadn't you taken the workmen's gloves off?
The Witness: Well, I had one off and one in my hand, holding it and the flashlight in my left hand, I believe it was.

Q. Now you ran after him because you thought that he might hurt himself?
A. I was not running.
Q. Well, you went after him. You walked after him because you thought he would hurt himself?
A. Yes, sir.
Q. Well, let me read you this testimony of the last trial, I am reading from page 318 of the record:

"Juror Number Six: And he staggered around the ship, is that it?
A. Yes.
Q. Was there anything the matter with you?
A. At that time?

Q. Yes.

A. Absolutely not.

Q. You say you were going to catch a drunken man. Why?

A. Well, Mister, I had been working that day up until [fol. 296] twelve o'clock, from twelve o'clock that day until midnight and if I wanted to catch him I could have got him, but I knew the man was drunk and I did not think at that time the man would hurt himself."

That is an exact contradiction to what you have stated to the jury now?

A. Well, that is what I said.

Q. I say, that is an exact opposite to the statement you just made to the jury?

A. I did not say that.

Q. You said because you were afraid he might hurt himself, that was the reason you were going after him?

A. Yes, and I wanted to find——

Q. Did you say that?

A. Yes, to find out what is wrong.

Q. You said that he might hurt himself?

A. Why, sure.

Q. Now at the last trial you said he would not hurt himself?

A. I don't remember that.

Q. Did you hear me read that, did you just hear me read that to you?

A. Well, will you please read the question again?

Q. All right.

"A. I had been working that day up until twelve o'clock and if I wanted to catch him I could have caught him, but I knew the man was drunk and I did not think at that time that the man would hurt himself."

That is what you said at the last trial was the reason you went after him. Now today you say the reason was because [fol. 297] you thought he might hurt himself, which is true?

A. Both of them is true.

Q. Now, you tell us you could not catch him because you had a sore foot, do you remember that?

A. That I could not catch him because I had a sore foot?

Mr. Wolfe: He did not say that.

The Witness: I did not say I could not have caught him. If I wanted to hobble.

Q. Well, the judge said how could you expect to catch up to him walking?

A. Because I did not run after him.

Q. Now in this statement you heard me read: "If I wanted to catch him I could have caught him."

A. Well, I could have.

Q. Now, Jackson, you make your answers just to fit the situation as it develops, don't you?

A. I am trying to tell the truth.

Q. Well, why don't you be fair with this man with the one eye?

Mr. Wolfe: I object to that.

The Court: Objection sustained. Don't intimidate the witness, ask questions.

Q. How many times did Cain fall down?

A. Maybe half a dozen, seven, or eight, somewhere around that.

Q. Did you see any blood on the deck?

A. No.

Q. Now you followed Cain all around the boat, sore foot [fol. 298] and all, didn't you?

A. Yes, sir.

Q. After working fourteen hours?

A. No, not fourteen hours.

Q. Well, thirteen hours?

A. I did.

Q. And you didn't know at that time that he had hurt himself, did you?

A. I did not.

Q. But you went right on after him anyhow?

A. Yes, with two fellows with me.

Q. And you had left your work unfinished downstairs, hadn't you?

A. I was just about finished that time.

Q. You had something for the wiper to do that you wanted done, that is the reason you went up to get the wiper, isn't it?

A. To stand the fireman's watch.

Q. Well, you discontinued what were were doing to follow Cain all around the deck of the boat, looking for him in every doorway that you could find?

A. Didn't I tell the jury I went up to get another man?

The Court: When you were running around after him were you looking for him?

The Witness: I was following him on up, because that was the direction I was going.

The Court: Then you were following Cain, but you were really going after the wiper?

The Witness: Yes, that was it, and I wanted to find out what was the matter with this man at the same time.

Q. Why did you go looking in all these rooms, and you [fol. 299] didn't find him, and then finally you did find him in the salon?

A. That is true.

Q. Well, now you say——

A. When I got to the fireman's forecastle he was not in there, and I did not know what was wrong with him. Then I went to find the fireman, this wiper and Stewart and I, we looked in the quarters and he was not there, so I sent the wiper on down to the fire room to turn to work.

Q. You were showing considerable interest toward this fireman named Cain, with respect to the fireman with the black eyes, weren't you?

Mr. Wolfe: I object to that.

The Court: Objection sustained.

Q. So you followed Cain right into the salon?

A. No.

Q. Well, how did you get into the salon from the starboard side?

A. There is a door on each side, the port and starboard.

Q. All you had to do was to go in the door?

A. Absolutely.

Q. Is that the way you got in?

A. Out of the starboard side.

Q. By what entrance did you get into the salon?

A. That is in a different position from the way I went.

Q. From what entrance did you get into the salon?

A. I passed by the salon near the fireman's forecastle, and as I came back even with the salon, there is a passage goes down below deck and there is rooms there.

Q. And you went down there?

A. Yes. I came back after looking down there, and he [fol. 300] was not in there, so when I came back I walked in the salon and there he was in the salon.

Q. What was he doing, sitting, standing, or lying down?

A. He was lying down.

Q. On what?

A. On the deck.

Q. Anybody else in the room with him?

A. A sailor.

Q. Did you see any blood all over him?

A. Yes, he was bloody at that time.

Q. And you threw a pail of water on him?

A. I wiped the blood off him.

(Recess until 10:30 a. m., July 31st, 1928.)

July 31st, 1928—10:30 a. m.

Trial Resumed.

ROY R. JACKSON recalled.

By Mr. Cuff:

Q. You did throw a pail of water on him, didn't you?

A. Yes.

Q. And as soon as you threw the pail of water on him then the captain came in, didn't he?

A. No.

Q. Soon after that?

A. Well, I had already sat him in a chair.

[fol. 301] Q. Well, how long after you had him sitting in a chair did the captain come in?

A. Well, maybe a minute.

Q. And as soon as the captain came in Cain said that you had hit him with a wrench, didn't he?

A. No.

The Court: What did he say?

The Witness: He said I hit him.

The Court: He said you hit him.
The Witness: Yes, but not with a wrench.
The Court: Did he say what you did hit him with?
The Witness: No.
The Court: What did you say when he said that?
The Witness: I told him I did not hit him.
The Court: Who did you tell, the captain?
The Witness: Yes, I told the captain I did not hit him.

Q. Now you say that Cain was sitting in a chair that you put him in, did he walk to that chair or did you carry him?

A. Well, I partly carried him, and he partly walked. Me, and a sailor partly carried him over there.

Q. Now Mr. Jackson, when was the first time in all of these falls that Cain had, that he sustained the injury to his face?

A. Which is what?

[fol. 302] Q. You said Cain fell down seven or eight times, didn't he?

A. Yes.

Q. On what fall did he hurt his face?

A. I don't know.

Q. Well, can you tell me on what fall he did not hurt his face?

A. I can't tell you that either.

Q. Now did he hurt his face when he fell on the port side of the boat at all?

A. I don't know that. I can't say; I was not up with the man.

Q. You were twenty feet away only from him when you started?

A. I don't know whether he hurt himself on the first fall or the second fall or the third fall.

Q. Well, when he ran around the stern, the deck house, on that fall can you say whether or not he hurt his face?

A. I cannot.

Q. In other words you can't tell us now whether he hurt his face on the first fall or the last fall or any of them?

A. Well, he hurt himself in one of his falls.

Q. But you can't tell which one?

A. No.

Q. You never had taken the opportunity, at any time while he was running and falling to see whether he had hurt himself when he got up?

A. The only time I knew he was hurt was when I found him in the salon.

Q. Will you tell the jury now just a slight variation of what you said. Was there any time from the time you started to run after him and when he started to run when he fell down and got up that you knew he had hurt himself, or that he was not hurt?

A. I cannot tell that because I don't know whether he got [fol. 303] hurt on his first fall or which one.

Q. Well, let me read to you the answer at the last trial, I read from page 315 of the record:

"Juror No. 12:

Q. What are they made of?

A. They are made of steel and connect the upper pipe to the cupboard. The cupboard is steel, about a quarter or three-eighths inch and they stand from the deck about eight inches, about ten inches apart. That is eight inches this way (indicating) and eight or ten inches, about ten inches this way (indicating).

Juror No. 12:

Q. Sharp corners?

A. No, no. They are rubbed over and Cain went to get on this pipe covering and he slipped and fell down again and I don't know whether that injury was the one or not. I don't know whether the first time he fell he got injured or not.

Q. But there was no injury at the time you saw him?

A. Why sure when he was in——"

Do you remember making that answer?

A. Yes, sir, I do; when he was in the port engine room door that was the first time that I saw him.

Q. Well it says here, "But there was no injury at the time that I saw him." Now you tell me when he was falling, don't you?

A. Yes, but I was not close enough to tell if he fell and hurt himself.

Q. Well, now you tell us that you cannot say—I withdraw that.

Q. Is your recollection better today than it was in May, at the last trial?

[fol. 304] A. I don't see where it is any.

Q. Well, how many feet is it from the engine door on the port side to amidship where Cain went into the room, went in off the deck, to the starboard side. I mean the way you were running around?

A. You mean the whole distance from the port engine room door?

Q. How many feet would Cain run from the engine room on the port side down and around the stern and up to the point where he went in off the deck again?

A. Well, around 250 or 275 feet, somewhere about that, maybe more.

Q. Well, that might be only 200 feet, might it not?

A. It is more. I say around 250 or 275 feet, probably more.

Q. Are you positive of that?

A. Yes, sir.

Q. I read from page 317 of the record of the last trial.

"Juror No. 6:

Q. While he came out of one entrance on one side of the ship and went in another entrance on another side of the ship. What is that distance."

That is the distance you are talking about now, isn't it?

A. It is from the starboard side. I was saying from one entrance to another entrance.

Q. Now I read to — again:

"Juror No. 6: Well he came out of one entrance on one side of the ship and went in another entrance on another side of the ship. What is that distance."

That is the same distance you are now talking about?

A. It doesn't say amidship. I say from one side to the [fol. 305] other side. There are two doorways, port and starboard of the engine room.

Q. You say that makes a difference in your answer. Well now let me read you a question before that:

"Juror No. 6: What is the distance would you say from the port side engine room door to the doorway on the starboard side where Cain went in, the complete distance, the circuit of the deck."

That is the one you just gave me, isn't it?

A. I said 250 or 275 feet.

Q. Let me read to you further from the record:

"You say there are two doors, that come out of one entrance on one side of the ship and one in another entrance on the other side of the ship. What is that distance?

A. Do you mean total or whole distance?

Q. Yes. I presume it would be at least 200 feet, maybe 250 feet, that is where I saw him until I found him in amidship."

Now do you tell us that it could not be 250 or 275 feet?

A. Didn't I say 250 or probably more.

Q. I asked you if it was 200 feet, and you said no?

A. Yes.

Q. Now you realize, don't you, that if Cain fell seven or eight times covering a distance of 200 feet, that he would be falling down about every sixteen feet. You know that from the last trial, don't you?

[fol. 306] A. Well, I did not measure it.

Q. Well say every 20 feet?

A. I don't think so.

Q. Well divide 8 into 200. Every 25 feet he would be falling down. He would fall every 25 feet, wouldn't he?

A. He might have run 50 feet and fallen again.

Q. You heard that at the last trial and you are trying to make that distance greater at this trial?

A. I was not asked it at the last trial.

Q. But you heard it, didn't you?

A. I was not asked it.

Q. Now, you say that Cain ran past Stewart?

A. Yes, sir.

Q. What was it that you called out when he ran past Stewart?

A. I hollered to him to stop, and I also told this fellow and the wiper to stop him.

Q. Did you say anything else?

A. Absolutely not.

The Court: Why were you trying to stop him?

The Witness: Because he was running away. He was supposed to go on watch. I think the man was crazy or something. If we can avoid an accident that way we try to do it if we can.

The Court: If you can avoid what kind of an accident?

The Witness: Well, you take a man that is drunk—A man [fol. 307] has to be sober to walk on the deck of an oil tanker, and then you are liable to get hurt.

The Court: You mean you wanted to stop him from being hurt, that is why you told him to stop?

The Witness: Absolutely. Not only with him but I try to do that with everyone. I try to stop them if he is drunk.

Q. You said nothing else to Stewart and that other man who was standing there, you didn't say anything to either of them, that is anything else?

A. With the exception I asked them what was the matter with this guy, was he crazy or drunk.

Q. You said the only thing you said to him was stop him, stop him.

A. Until I got up to them. That is why I told them after I got up there.

Q. You did say is he crazy or drunk?

A. Yes.

Q. You knew all about his condition, didn't you?

A. Yes, but he seemed to be sober enough at that time.

Q. Well Pankor came down and had a talk to you about him, and told you he had talked to him?

A. I don't have to go by what somebody else tells me.

Q. And that is your answer to that, is it?

A. Yes.

Q. That you did not believe what Pankor told you?

[fol. 308] Mr. Wolfe: I object to that, he did not say that.

Mr. Cuff: Very well, I withdraw the question.

Q. Well, was it in your mind while chasing this man that he might be crazy?

A. I knew the man was intoxicated.

Q. I asked you whether it was in your mind when you were chasing this man that he might be crazy?

A. Yes, because when a man gets that stuff in his head you can never tell what he will do. He is liable to jump overboard, I know that they have done it.

Q. Of course; and to keep him from jumping overboard, that is why you were running after him?

A. I did not run, I walked.

Q. You say you did not run after him?

A. No, I did not run.
Q. Are you sure of that?
A. I walked all of the way.
Q. You never ran a step?
A. I did not take any chances.
Q. Do you realize that you are under oath?
A. Why certainly.
Q. Well, now, I will read page 270 of the record of the testimony of yesterday:

"Q. What did he fall over?
A. Well, there were several things like skylights, and anchors, and so forth that he could have fallen over, but anyhow as I ran around the corner housing he was going around."

Did you say that yesterday?
A. That I ran? I think I said yesterday that I walked, [fol. 309] that the man was sixty feet away from me.
Q. Did you say that or has the stenographer made a mistake?
A. He might have too, I remember saying I walked.
Q. Well, will you say you didn't say that?
A. If it is in there I might have said it. I told over four times that I walked.
Q. Will you tell the jury anything else that you have said yesterday or today that you did not mean, is there any other thing?
A. I have not said anything that I don't mean.
Q. Well, you said you ran at that time when you mean you walked, that is true, isn't it?
A. I do not see how I could have——

Mr. Wolfe: I object to the form of the question.

Q. Is the record correct?
A. If it has got it "ran" I don't believe it is. I told the jury three or four times that I walked.
Q. Yes. But once you told that you ran. When you were questioned by your own attorney you slipped in the word run.

Mr. Wolfe: I object to the words, "slipped in".
The Court: Strike it out.

Q. Now, you were on this boat 17 days, weren't you?

A. Yes, just about that.

Q. And you left the ship also when you got back to New York?

A. I was doing that as per agreement.

[fol. 310] Q. Did you leave the ship, that is what I asked you?

A. I did not stay on there.

Q. You left the employ of the company?

A. Yes.

Q. Do you drink?

A. Occasionally.

Q. What do you mean by that, occasionally?

A. When I feel like it.

Q. Well, once a day?

A. Well, in a foreign port maybe in England or some place like that I will have a glass of beer, maybe in this country.

Q. That is your complete answer to the statement that I asked you "Do you drink", that when you go to a foreign country you might take one glass of beer or in this country you might take it?

A. Yes.

Q. You never said anything about a drink of whiskey, did you?

A. Well, I might take a drink of whiskey once in a while.

Q. You didn't tell that to the jury at all until I had dragged it out of you?

A. You said did I drink; you didn't say of what.

Q. Why didn't you tell me that when I asked you drank that you drank water?

A. Well, I do drink water.

Q. You told the jury first that you drank just beer, and then when I questioned you further and picked up the record of the last trial, you state you drink whiskey?

A. I do occasionally, yes.

Q. And when anybody asks you do you drink, do you know what they mean by that?

Mr. Wolfe: I object.

[fol. 311] The Court: Objection overruled.

Mr. Wolfe: Exception.

A. No, I did not run.
Q. Are you sure of that?
A. I walked all of the way.
Q. You never ran a step?
A. I did not take any chances.
Q. Do you realize that you are under oath?
A. Why certainly.
Q. Well, now, I will read page 270 of the record of the testimony of yesterday:

"Q. What did he fall over?
A. Well, there were several things like skylights, and anchors, and so forth that he could have fallen over, but anyhow as I ran around the corner housing he was going around."

Did you say that yesterday?
A. That I ran? I think I said yesterday that I walked, [fol. 309] that the man was sixty feet away from me.
Q. Did you say that or has the stenographer made a mistake?
A. He might have too, I remember saying I walked.
Q. Well, will you say you didn't say that?
A. If it is in there I might have said it. I told over four times that I walked.
Q. Will you tell the jury anything else that you have said yesterday or today that you did not mean, is there any other thing?
A. I have not said anything that I don't mean.
Q. Well, you said you ran at that time when you mean you walked, that is true, isn't it?
A. I do not see how I could have——

Mr. Wolfe: I object to the form of the question.

Q. Is the record correct?
A. If it has got it "ran" I don't believe it is. I told the jury three or four times that I walked.
Q. Yes. But once you told that you ran. When you were questioned by your own attorney you slipped in the word run.

Mr. Wolfe: I object to the words, "slipped in".
The Court: Strike it out.

Q. Now, you were on this boat 17 days, weren't you?

A. Yes, just about that.

Q. And you left the ship also when you got back to New York?

A. I was doing that as per agreement.

[fol. 310] Q. Did you leave the ship, that is what I asked you?

A. I did not stay on there.

Q. You left the employ of the company?

A. Yes.

Q. Do you drink?

A. Occasionally.

Q. What do you mean by that, occasionally?

A. When I feel like it.

Q. Well, once a day?

A. Well, in a foreign port maybe in England or some place like that I will have a glass of beer, maybe in this country.

Q. That is your complete answer to the statement that I asked you "Do you drink", that when you go to a foreign country you might take one glass of beer or in this country you might take it?

A. Yes.

Q. You never said anything about a drink of whiskey, did you?

A. Well, I might take a drink of whiskey once in a while.

Q. You didn't tell that to the jury at all until I had dragged it out of you?

A. You said did I drink; you didn't say of what.

Q. Why didn't you tell me that when I asked you drank that you drank water?

A. Well, I do drink water.

Q. You told the jury first that you drank just beer, and then when I questioned you further and picked up the record of the last trial, you state you drink whiskey?

A. I do occasionally, yes.

Q. And when anybody asks you do you drink, do you know what they mean by that?

Mr. Wolfe: I object.

[fol. 311] The Court: Objection overruled.

Mr. Wolfe: Exception.

The Court: What did you think he meant. What did you understand him to mean?

The Witness: I understood him to mean——

The Court: I asked you what you understood him to mean when he said, "Do you drink?"

The Witness: Well, I guess I mean whiskey and so forth, and beer and so forth.

Q. You mentioned the whiskey at all until you saw me pick up the testimony of the last trial, which is on the desk here in front of me——

A. You don't see anything in the testimony about whiskey, in the last trial.

Q. You know all about this testimony, don't you?

A. Yes, I made it.

Q. Well, you read this testimony, didn't you?

A. I might have looked through it.

The Court: Did you read it?

The Witness: I believe I did.

The Court: Do you believe you did or did not?

The Witness: I did.

Q. Jackson, are you trying to tell the truth here or just trying to get out of this thing?

A. I did not read it all the way through.

[fol. 312] Q. You know whether you read these typewritten pages or not, don't you?

A. Not all of them.

Q. Well, some of them?

A. Yes.

Q. And you know that it doesn't say anything about that you never drank whiskey?

A. I know what I told the jury on the last trial.

Q. Counsel gave you this testimony to look over?

A. I looked through it in his office, that is all.

Q. He gave it to you to look over, didn't he?

A. Yes, I looked through it.

Q. Well, when did that happen? You did not get it from the stenographer, did you?

A. No.

Q. You got it from the lawyer, didn't you?

A. Yes.

Q. And you are trying to make your answers now fit your answers at the last trial, aren't you?

A. No. Only to answer what I am asked here.

Q. Did you ask me to let you have this testimony of the last trial?

A. No.

Q. Well, did you ask your own counsel to let you have this testimony of the last trial?

A. I did.

Q. Now, Jackson, if you were telling the truth, why did you want that testimony to remind you of what you did say at the last trial?

A. I only looked through it to see what I did say in the last trial.

Q. You wanted to find out what you said at the last trial?

A. No, not altogether.

[fol. 313] Q. Because what you said at the last trial, you want to remember because it was the truth?

A. What is that?

Q. Because what you said at the last trial, you want to remember, because it was the truth?

A. That is what I am up here now for, to tell the truth.

Q. But you wanted to know what you said at the last trial so today you would say the same thing, is that right?

A. Not altogether, no.

Q. Can you give any other reason why you wanted to read the testimony?

A. I am up here to answer whatever you ask me.

Q. Can you give any other reason other than you wanted to check on the statements you made at the last trial so you would not make any different ones at this trial?

Mr. Wolfe: I object to the question.

The Court: Objection overruled.

Mr. Wolfe: Exception.

Q. State what the reason was that you had for asking counsel to let you read that testimony of the last trial?

Mr. Wolfe: I object.

The Court: Objection overruled.

Mr. Wolfe: Exception.

A. I just wanted to look through it.

Q. State the reason?

A. I just wanted to look through it and see how the trial was.

Q. You remember it pretty well?

[fol. 314] Mr. Wolfe: Remember what?

Mr. Cuff: The testimony.

The Witness: I don't know whether that corresponds with the testimony here or not.

Q. You knew that I could not find in here any statement that you drank whiskey?

A. I remember the last time——

Q. You knew that?

A. Yes.

Q. And you looked that up before, didn't you?

A. No, not particularly, no.

Q. You say you did not read it up, you did not read this testimony?

A. No, not everything, no.

Q. But you did read that part of it where it mentioned about your drinking?

A. No, I did not.

Q. Well, will you tell me how you knew it was not in there?

A. Because I told you on the last trial——

Q. If you told me at the last trial it would be——

Mr. Wolfe: You told him what at the last trial?

The Witness: He did not ask me anything about whiskey at all at the last trial. He asked me if I had any drinks and I told him I had two bottles of beer.

Q. You remember that?

A. Yes.

Q. You remember that Pankor had two bottles of beer, [fol. 315] too?

A. I don't remember what Pankor had.

Q. You remember you made the same answer exactly when I said do you drink?

A. I said I took a drink occasionally. I do drink when I feel like it.

Q. All right. Now Cain worked on your watch, didn't he?

A. Yes, sir, on the twelve to four.

Q. He was with you when you were on duty?

A. Absolutely.
Q. And the whole 17 days except when he was in his bunk, is that right?
A. With the exception in port, yes.
Q. And you and Cain were not bad friends, were you?
A. I had nothing in the world against the man.
Q. As far as you know he had nothing against you?
A. Absolutely not.
Q. Now this man received a terribly injury, didn't he?
A. I don't know how bad the injury was until I came up to the Court here.
Q. Just come up here a minute Cain. Tell me whether he has not received a very bad injury?

Mr. Wolfe: I object to this.
The Court: Objection sustained.
The Witness: I am not a specialist.
Mr. Cuff: Step back, Mr. Cain.

Q. Now then he was three days in his bunk?
A. No, about two days, about two days and a half. He [fol. 316] missed about five watches.
Q. So did you, as his immediate superior, ever visit him in the bunk?

Mr. Wolfe: I object to that question. What difference does that make?
The Court: Objection sustained.
Mr. Cuff: Exception.

Q. Now did you ever go down to Cain in his bunk——

Mr. Wolfe: I object——

Q. (Continuing:) —to see the extent of his injury, growing of your following him around on the deck?

Mr. Wolfe: I object, your Honor.
The Court: Objection sustained.

Q. When you went ashore were you with the captain?
A. No, I was not.
Q. Had you taked to the captain about it?

The Court: About what?
Mr. Cuff: Going ashore.
The Witness: Whereabout do you mean?

Q. At Venezuela on February 5th, the only day we are talking about here?

A. Well, when we came into New York—oh, you mean Venezuela?

[fol. 317] Q. Yes.

A. No. I did not say anything to the captain.

Q. Did you tell him where you were going?

A. Absolutely not.

Q. Didn't mention to him at all?

A. No.

Q. Well, you violated the rules of the ship to go ashore without permission, didn't you?

A. Not necessarily.

Q. I asked you, you violated the rules of the ship by going ashore without permission, didn't you?

A. Why, yes, to a certain extent, but the ship was going to be in, so I had plenty of time.

Q. You violated the rules, didn't you?

A. Not necessarily.

Q. The rule is you are not supposed to leave the ship without the permission of the captain in a foreign port?

A. If I asked the captain for permission he is liable to not let me go, he is not responsible for me anyhow.

Q. I have recited this rule. As I understand the rule, in a foreign port, you are not supposed to leave the ship without the permission of the captain. Am I right about that?

Mr. Wolfe: What rule, I object.

The Court: Objection overruled.

Mr. Wolfe: Exception.

The Court: He may answer about the rules.

Q. Is there any rule?

A. About going ashore in a foreign port?

The Court: Yes.

[fol. 318] The Witness: There is a rule.

Q. What is it?

The Court: What is it?

The Witness: You are supposed to have permission from the master.

Q. To go ashore in a foreign port?

A. But nobody ever gets it.

Q. Never mind what nobody ever gets on this ship or any other ship. What is the rule?

The Court: He has told you that. Let us get ahead.

Mr. Cuff: I move to strike out that part of the answer "Nobody ever gets it."

The Court: Strike it out.

Q. Now when you pursued Cain around the deck were you trying to overtake him?

A. Why, I was following him on up and if he had stopped I would have overtaken him.

Q. Were you trying to overtake him, yes or no?

A. Yes.

Q. You were trying to overtake him?

The Court: He said so. Let us get ahead.

Q. Well, you could have caught him if you had wanted to, couldn't you?

A. If I wanted to chance hurting myself, yes. I had a [fol. 319] bum foot at that time. I was also very tired.

Q. Now in substance your statement at the last trial was that you did not catch him because you did not want to catch him, isn't that right?

A. I wanted to catch him, but I was not going to run.

Q. I didn't say what you wanted. I said what you said at the last trial, isn't it a fact in substance that you said you did not catch him because you did not want to catch him.

Mr. Wolfe: I object to that, your Honor, we have been over it and over it.

Mr. Cuff: Very well, I will not press it.

Q. All that you did to Cain, all that you said to him you did in the manner of performing your duty. No malice on your part against Cain?

A. What is that?

Q. You did not have any grievance against Cain at all, did you?

A. No.

Q. Everything you did, running after him, and so forth, was in the performance of your duty?

A. I never said anything out of the way to him.

Q. Your running after him, all that you did in your opinion, was in the performance of your duty wasn't it?

A. Yes.

Q. When did you go to work for the Pure Oil Company?

A. June 8th, 1927.

Q. On what ship?

A. The W. W. Mills.

[fol. 320] Q. Where were you employed before that?

A. Well, I think it was the Atlantic Refining Company.

Q. When did you go to work there?

A. The Atlantic?

Q. Yes.

A. I started in the Atlantic in 1925 before——

Q. I mean after you left the Alpha, what was your first job?

A. Second assistant on the J. E. O'Neil.

Q. When did you go there?

A. I think that was about the 14th of March.

Q. When did that—I withdraw that. Where did that boat leave from?

A. From Philadelphia.

Q. And where did it go?

A. At that time she was running down to Ruble, Dutch West Indies.

Q. Where were you from the time you left the employ of the Alpha Steamship Company until you went on the O'Neil?

A. In St. Agnes Hospital.

Q. Where is that?

A. Philadelphia.

Q. Now I just want to ask you about the sailing of the ship. Was that ship to sail at seven o'clock on February 5th?

A. Probably, yes, I am not sure.

Q. What is that?

A. I was not positive.

Mr. Wolfe: I object, your Honor, he has been all over that.

The Court: He may answer.

Q. Now did you have any orders that the ship was to sail [fol. 321] at seven o'clock on February 5th?

A. To have things ready by seven.

Q. Was there any intention of the ship sailing, do you know?

A. Probably, if the ship was loaded in time, I don't believe she was loaded at that time.

Q. You say it was very probably it was the intention to sail at seven o'clock?

A. Yes, if the ship was loaded.

Q. Did you hear Mr. Pankor testify that the ship was to sail at seven?

A. I may have, I do not remember, I might have been outside.

The Court: Is that all?

Mr. Cuff: I think that is all, your Honor. Yes, that is all.

Redirect examination.

By Mr. Wolfe:

Q. As a matter of fact you read the testimony of the last trial because I told you to, didn't you?

A. I looked through it, yes.

Q. You were asked whether you left the Alpha at the end of the trip in question. Will you explain why?

A. Yes. I went aboard the Alpha on the 26th of January under the agreement of making one voyage as a relief trip and return back to New York again, which I did.

Mr. Wolfe: That is all.

[fol. 322] Recross-examination.

By Mr. Cuff:

Q. You told me a moment ago that you asked the attorney for the testimony.

Mr. Wolfe: I object, he said no such thing.

The Court: Yes, he did.

The Witness: I do not recall whether he gave it to me or whether I asked him for it.

Q. Now, you say *you say* the attorney gave it to you.

A. Well, as I say, I do not recall whether he gave it to me or whether I asked him for it. I know I looked through it.

Q. Do you realize that in two questions you have sworn the exact opposite, with respect to the reading of the testimony, you told us that you asked for it, and you told your own attorney that you read it because he gave it to you——

A. Well, I think he did ask me to read it.

The Court: When you left the engine room downstairs, and went up the ladder and proceeded along the deck and looked through the various rooms, did you do that under your own volition or were you asked to do it?

The Witness: I may have had that in my mind myself.

Juror No. 4. Nobody asked you to do it?

[fol. 323] The Witness: No.

By Mr. Cuff:

Q. You did that in your capacity as second assistant engineer, didn't you, yes or no?

A. Yes.

Q. You didn't go looking around for Cain for some personal reason?

A. Certainly not.

Q. You only did that in the performance of your duty.

A. Well, I will have to explain this. After I went to the firemen's fo'castle, and he was not in there I did not know what had become of him and I figured that he would go to the firemen's fo'castle——

Q. Well never mind, all this was done in the performance of your duty as second assistant engineer?

A. To what, to look after him?

Q. Everything that you were doing. You went around looking for him, you were not doing that of your own personal reasons, were you?

A. Why sure I was. It was not duty to go chasing around the ship for him.

Q. Now do you realize that within two minutes you have said you did not do that of your own personal account and now you say, why sure. Do you realize that?

A. Well, after I did not the man up there——

Q. I am just asking you about your testimony within the past two minutes, you say that is a sort of waste of time. You have answered it yes one time and no the next.

Mr. Wolfe: I object to all this as argumentative.

[fol. 324] Q. Now Mr. Jackson, I ask you again, did you pursue Cain of your own personal account, and you said no. I have just asked it of you again, and you have said, why sure, yes. Which is so?

A. Well, I don't understand you, but first look at it——

Q. Which is true?

The Court: He said he did not understand you.

Mr. Wolfe: I object to the form of the question.

The Court: Objection overruled.

Mr. Wolfe: Exception.

A. I went to look for him on my own accord.

Q. As second assistant engineer?

A. That doesn't matter.

Q. You were on duty.

A. It doesn't matter whether I was or not.

Q. You were going after him for the purpose of getting—to do something with respect to his work, weren't you?

A. No, I was going to see where he was at. I would not leave him go down to work in the engine room if he was drunk.

Q. But you thought it was your duty to go after him?

A. I don't know, it may have been my duty.

Q. Nobody told you to do that, did they?

A. No.

[fol. 325] Q. And you must have thought it yourself?

A. I may have, of my own accord.

Q. So as far as the judgment that you exercised, that was your own judgment?

A. Yes.

Q. You had had a fireman working for eight hours down in the engine room up to twelve o'clock, hadn't you?

A. Yes.

Q. And you wanted to get another fireman to relieve him, didn't you?

A. A wiper.

Q. And you went for Cain first and you didn't get Cain, so you decided to get a wiper?

A. I did not say that.

Q. Now I won't go into that. I believe you say now you did not go for Cain before you went for the wiper?

A. I did not say that in the beginning. I said I went for the wiper.

Q. Didn't you tell us you went up to awaken Cain in his room?

A. Yes, that was before.

Q. Now I am talking about the whole thing. You went for Cain, the fireman, to come down and attend to the duties in the fireroom?

A. At eleven forty, yes.

Q. You didn't get Cain?

A. He came down around twelve forty.

Q. And you went down in the engine room and you came up later on to get your wiper?

A. That is when I saw Cain in the door.

Q. And you came up to get a wiper?

A. Not Cain.

Q. Yes, and you saw Cain?

A. Yes.

Q. And then it was that you started to get after Cain?

A. Yes.

[fol. 326] Mr. Cuff: That is all.

Mr. Wolfe: That is all.

FREDERICK FAIRLEY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Please speak up good and loud now Mr. Fairley so that we can all hear you.

A. I will try.

Q. What is your occupation?

A. Seaman.

Q. How long have you been going to sea?

A. Pretty near 30 years.

Q. Have you got any licenses?

A. No, sir.

Q. That is, you are a member of the crew when you go to sea?

A. Yes.

Q. Now you were a member of the crew of the Steamship Alpha on February 5th, 1927?

A. Yes, sir.

Q. What position did you have on the Steamship Alpha?

A. Pumpman.

Q. Are you employed by Walker & Daly now?

A. No, sir.

Q. How long have you been away from there—I withdraw that. How long has it been since you were employed by Walker & Daly or the Alpha Steamship Company?

A. Well a year ago, I think.

Q. Where are you employed now?

A. The Steamship America of the United States Lines.

Q. And who is your employer?

[fol. 327] A. The United States Shipping Board.

Q. Did you get a subpœna to come over here from me?

A. Yes, sir, I did.

Q. Now have you got any interest at all in this suit, one way or another?

A. None whatever, sir.

Q. Now the night of February 5th, 1927, you were aboard the Steamship Alpha as she was lying in the harbor at this port in Venezuela?

A. Yes.

Q. What are the duties of pumpmen on board an oil tanker?

A. Well, when we are loading I just stand by.

Q. Were you loading on February 5th?

A. Yes.

Q. And you were standing by?

A. Yes.

Q. What time did you finish loading?

A. After ten o'clock, that night, I think.

Q. Well, after finishing loading, what are your duties?

A. Well, I generally go down in the pump room and close off the valves in case of any leakages.

Q. Anything to do with the steam on deck?

A. Yes, sir, I put it on and shut it off, whatever is required.

Q. You were on duty on the deck of the Steamship Alpha on the night of February 5th?

A. Just standing by, sir.

Q. Did you see the plaintiff in this case, Mr. Cain, on the night of February 5th?

A. Yes.

Q. When was the first time you saw him, the night of February 5th?

A. Between eleven and twelve o'clock.

Q. What was he doing?

[fol. 328] A. I saw him going toward the engine room.

Q. What?

A. I say I saw him going toward the engine room.

Q. Do you know a drunken man when you see one?

A. Yes, sir, I do.

Q. You are able to tell a drunken man when you see one?

A. Yes.

Q. Was Cain drunk or sober?

A. He was pretty well intoxicated.

Q. You are referring to this plaintiff now, are you?

A. Yes, sir.

Q. What time was that, you say, between eleven and twelve?

A. I think so.

Q. Did you see him after that?

A. Yes.

Q. When?

A. When I came up the starboard side, I saw him when he was coming up the starboard side.

Q. You saw him when he was coming up the starboard side of what?

A. Well he appeared to me to come out of the engine room, I don't know that for sure, but he did come up the starboard side.

Q. Were you sitting or standing?

A. I was sitting.

Q. Where were you sitting?

A. Amidship.

Q. Which side of the vessel?

A. The starboard side of the vessel.

Q. The starboard side?

A. Yes.

Q. How far is that from the after end of the engine room bulkhead?

A. The engine room to amidship is nearly 200 feet.

Q. And you were about 200 feet from the engine room, starboard side?

A. Yes.

Q. What directed your attention to the plaintiff, Mr. Cain?

[fol. 329] A. Because I heard a noise. It would make a noise with a man jumping on them plates. These plates were all loose.

Q. To what plates do you refer?

A. The covering of the steam lines and the electric wire lines on the starboard side of the ship.

Q. Well, what kind of a noise did you hear? How would the loose place have anything to do with it?

A. Well, you could hear any noise there at midnight.

Q. What kind of a noise?

A. A noise of the plates.

Q. What caused the noise?

A. Well, somebody falling over the plates.

Q. You mean he was running or walking?

A. He was stumbling.

Q. Did you turn around and look?

A. I was looking that way because the gangway was alongside of me.

Q. What way?

A. Up toward the way that Cain was coming.

Q. Well, what did you see there?

A. I saw him fall near the galley.

Q. Where is the galley?

A. Right just in front of the engine room.

Q. Well, how far away was that from you?

A. Sixty feet, very near sixty feet from me.

Q. Do you know what he fell over?

A. He fell over the plates, I guess.

Q. Then did you watch him as he came forward?

A. Yes, sir.

Q. And what did you observe as he came forward?

A. He fell again. He fell over the valve on the deck.

[fol. 330] Q. He fell over the valves on the deck?

A. Yes, two or three of them.

Q. Can you state how many times he fell before he got abreast of you?

A. Two or three times. I do not know, I did not see him close after that.

Q. Well, what was his condition?

A. That I do not know; I was not close enough to him.

Q. I mean was he drunk or sober?

A. Well he went below——
Q. I am asking you was he drunk or sober?
A. He was under the weather when he went down below.
Q. By that you mean he was drunk?

The Court: What do you mean when he went down below?
The Witness: When he was going on watch.
The Court: What time?
The Witness: Somewhere between eleven and twelve.
The Court: This is the first time?
The Witness: Yes.
The Court: How long after that was it that you saw him fall?
The Witness: A very few minutes after twelve.
The Court: A little after twelve?
The Witness: Yes.
The Court: About how long after you first saw him?
[fol. 331] The Witness: I can't say exactly, sir.
The Court: Well about, was it an hour or ten minutes?
The Witness: It was not an hour, it was over a half hour.
The Court: Over a half hour, but not an hour?
The Witness: Yes.

Q. Did you have a watch with you at that time?
A. No, sir.
Q. This is just your estimate?
A. Yes, sir.
Q. Now did you see anyone following Cain around the deck up on the starboard side?
A. No, sir.
Q. When you saw Cain come up to the deck what did you do?
A. I went down below. My companionway led down to my room, and it is right alongside of amidship.
Q. What did you go down below for?
A. To get away out of their way.

The Court: Out of whose way?
The Witness: When I see one or two drunken men——
The Court: How many did you see?
The Witness: I saw——
The Court: Did you see anybody following him?

The Witness: No, sir.
The Court: Why did you go down?
The Witness: To get out of their way.
The Court: Out of this man's way?
The Witness: Anybody's.
[fol. 332] The Court: Why did you go down at that time, because you saw this man coming and he thought he was drunk?
The Witness: Yes, sir, I got out of the way.
Mr. Wolfe: That is all.

Cross-examination.

By Mr. Cuff:

Q. What did you mean when you said "When I saw one or two drunken I got — of their way"?
A. I always do.
Q. Did you see more than two drunken men?
A. There was more than him drunk aboard that night, the other seamen there, they were drunk.
Q. Only seamen drunk?
A. That is all I saw.
Q. How many men on the starboard side of the deck were there, at the time you were there, when Cain came around?
A. I can't say.
Q. You knew there was one?
A. Well, when an oil tanker is leaving a port the probability is you will find them all hanging around.
Q. Do you know when that ship left?
A. She left in the morning.
Q. We are talking about midnight, aren't we?
A. Yes, she left in the morning of that same day.
Q. You say now when the ship is leaving the dock they are all on deck. Were they all on deck at that time?
A. She did not leave at midnight. There is always lots [fol. 333] of men hanging on deck.
Q. Were all the men on deck at that time?
A. Not all.
Q. How many were on the starboard deck?
A. I can't say that.
Q. Well, give me some idea?
A. I can't.

Q. Well, were there ten or two or twenty or twenty-five?

A. I cannot tell you how many there were.

Q. Well, you were not here when Jackson testified, were you?

A. Yes, sir.

Q. How many drunken — did you say there was on the starboard deck at midnight on February 5th—6th?

A. I don't know about the starboard deck.

Q. Well, that is where you were?

A. Well that deck is open all the way across, sir.

Q. Well that is where Cain came running as you describe?

A. Yes, sir.

Q. And it was to get out of the way of the drunken men that you went downstairs?

A. Yes, sir.

Q. What drunken men did you see?

A. A drunken man I said.

Q. Do you deny you told the jury and the judge you went down when you saw one or two drunken men, and that you got out of the way?

A. That is right.

Q. Well, why did you put it two drunken men?

A. I always get out of the way.

Q. Well why didn't you tell them you get out of the way when you see a drunken man?

A. When I see drunken men, down I go. When I see [fol. 334] any trouble around, down I go.

Q. Well, why did you say one or two drunken men coming along your side was the reason for your going downstairs and not you tell us it was only one drunken man that came?

A. I did not say only one or two. All I saw was Cain came up there at that time.

Q. Now you know that Jackson came up after him?

A. No, sir.

Q. Well, you knew this whole case is whether Jackson was drunk or not?

A. Jackson was not drunk.

Q. You knew that was what this case was about.

A. (No answer.)

Q. You were told to take the witness stand and say he was not drunk, weren't you?

Mr. Wolfe: I object as highly improper.

The Court: Strike it out.

The Witness: I won't tell no lies here for nobody.
Mr. Cuff: I move to strike out the answer.
The Court: Motion denied.

Q. There was a lot of drunken men on board that night?
A. There was a few.
Q. Do you realize that a little while ago that you said there was a lot of drunken men on the boat that night, two or three seamen, do you realize that?
A. Well, there could not have been an awful lot because she only carried a crew of 32.
Q. Was there a lot of drunken men?
[fol. 335] A. Well, there was some of them drunk.
Q. How many?
A. I can't tell you. I kept out of their way as I told you.
Q. Well you had to see them in order to get out of their way, didn't you?
A. Well, certainly.
Q. You don't want to impress this jury in any way, that any one of the officers were drunk?
A. Not in my sight; not one of them under the influence of liquor.
Q. You want to make sure of that.

Mr. Wolfe: I object to that.
The Court: Objection sustained.

Q. The only drunkards on the boat was Cain and the seamen?
A. He was one of them.
Q. And the seamen?
A. Yes.
Q. Drunk*ed*ness was so general on that boat that you cannot tell us how many were drunk?
A. No, it was not general. There was only some of them drunk.
Q. Well was it a regular thing to see drunken men on that boat?
A. Well, on every ship I have ever been on, it is a regular thing.
Q. On that boat I am talking about.
A. No, sir, not a regular thing on that ship, no more than any other ship.
Q. I am asking you if it is a regular thing to see drunken men on that boat?

A. One or two always.

Q. On that night would you say there was one or two?

A. I told you now there was a few of them drunk. How many, I don't know.

Q. Now on other nights, were there men drunk on that [fol. 336] boat?

A. No, we were out at sea. We only stayed in one night.

Q. They were not drunk any other night?

A. No, unless it is in New York.

Q. Do you say now they were not drunk on any other night?

A. They could not get drunk on the trip up.

Q. Do you know any reason why they could not?

A. Because they could not get it.

Q. Well, can't they bring it on the boat?

A. But if Captain Smith is on the boat he won't let them do it.

Q. Well, how is he going to stop them if he is off the boat, ashore?

A. Well, there is a mate in the gangway.

Q. Well, what does he do?

A. He stops liquor from coming aboard.

Q. Are you sure about that?

A. Yes, sir.

Q. Do you know that Stewart said that he brought liquor on the boat at the last trial?

A. Well, maybe he did, but if he did he smuggled it aboard.

Q. Which mate was at the gangway?

A. I can't tell you which one was on duty that night, sir.

Q. Now, you are employed by whom?

A. The United States Shipping Board, now.

Q. And you were employed by Walker & Daly, the defendants in this action?

A. Yes, sir, some time ago.

Q. And they employ a great many men to go on boats, don't they?

A. I don't know anything about Walker & Daly except the ships they have. The Alpha and the Beta, and I have [fol. 337] always been employed on only one, the Alpha.

Q. Did you see Stewart on the starboard side of the boat that night?

A. I saw him aboard but which side he was on I don't know.

Q. He was on the starboard side of the boat, wasn't he?

A. I don't know whether or not he was. I saw him aboard that night.

Q. Well, he was within 50 feet of you if you are telling the truth.

A. Well, he may have been.

Q. And you mean to tell us you would not see him if he was within 50 feet?

A. I did not take notice of everybody around.

Q. Well, Jackson testified there was only two people on that deck. Stewart and another man. When Jackson came around behind Cain at the very time you were there, at the time we are talking about——

Mr. Wolfe: I object.

The Court: Where were you sitting, how far down aft, can you say?

The Witness: All the way, right back to the engine room.

The Court: Two hundred feet?

The Witness: There was light there, cargo light.

The Court: And could you see all the way down the deck?

The Witness: Yes, on account of the cargo light.

Q. Did you see Cain running the whole 200 feet?

[fol. 338] The Witness: I ask——

The Court: About how many feet from where you were did you first see Cain, or let me put it this way, when you first saw Cain running, about how many feet was he from where you were sitting?

A. 200 feet, perhaps.

The Court: In that whole 200 feet you could see him the whole time?

The Witness: Until he fell down, three times.

By the Court:

Q. About 50 feet from you?

A. No, sir, about 100 feet.

Q. During all that time, the whole 200 feet, you did not see Jackson behind you?

A. No, sir.

Q. Never saw Jackson at all?

A. No, sir, not until he came down to my room.

Q. I am talking about the deck?

A. No, sir.

Q. How far was Cain from you when you went down your gangway?

A. Pretty near 100 feet, 75 or 100 feet, anyway, when I went down below.

Q. I thought that you said when he first fell here that he was 175 feet away from you then?

A. Well, that was outside the galley on the way the ship is built.

Q. You said that you saw — when he was about 200 feet [fol. 339] away from you?

A. Yes, sir.

Q. You said he was 175 feet away when he first fell?

A. Yes.

Q. And he had gone about 25 feet when he first fell from the time you first saw him?

A. Yes.

Q. Well, when did he fall the second time?

A. Over the bow.

Q. Well, how much further, in feet?

A. Well, that is only a few feet further.

Q. Well, about how near to you was he at the second fall?

A. Well, ten feet nearly.

Q. That would be about 165 feet?

A. Yes.

Q. And the third time?

A. That is about five or six feet away.

Q. Well, that would be 155 feet?

A. Yes.

Q. And the next time?

A. That was over the pipe line.

Q. Well, how far from you?

A. Well, about 100 feet.

Q. And the next time?

A. I did not see him fall at all then because I went below.

Q. Did you go below when you saw him fall?

A. Yes, sir.

Q. From the pipe line, or did you wait?

A. No, sir.

Q. Then he was about 100 feet from you when you went below?

A. Yes, sir.

The Court: That is all.

[fol 340] Redirect examination.

By Mr. Wolfe:

Q. Did you see Jackson that night?

A. Yes, sir.

Q. What was your—I will withdraw that. What time was it when you saw Jackson?

A. Between twelve and one o'clock, I can't say the exact time.

Q. Was it after the episode when Cain fell on the deck?

A. Yes, sir.

Q. And you stated that he came down to your room?

A. He did, sir.

Q. Well, what was his condition?

A. Jackson was sober.

Q. Any doubt in your mind?

A. Not the slightest.

The Court: What was he doing down in your room?

The Witness: Well, he came down and he asked me, Have you seen Shorty here—that is what we call this man here (indicating Cain, the plaintiff). I said no, and he said, well, he is going around the ship here acting crazy, like a crazy man. He says to me well, will you be a good fellow and go up and see what he is after. So I put on my slippers and me, together with several sailors and one oiler went up, and I know that one oiler went along. We could not find him and as we were coming back we looked through the port hole in the salon; the captain was bandaging his head.

[fol. 341] The Court: Where was Jackson?

The Witness: He was not there. He was back in the engine room, I think, anyhow he was not there.

By Mr. Wofe:

Q. You never saw me in your life until yesterday, did you?

A. No, sir.

Mr. Wolfe: That is all.

Recross-examination.

By Mr. Cuff:

Q. How did you happen to come here today?
A. I got a subpœna.
Q. When did you get the subpœna?
A. On Sunday, I think I got the subpœna.

The Court: On Sunday?

Q. Who talked to you before you got the subpœna?
A. No, sir, nobody taked to me.
Q. So when you took the witness stand, no one in this room knew what you were going to say?
A. No, sir, I don't think they did.
Q. You have not spoken to anybody about it?
A. I don't think anyone knew anything about what I knew.

Mr. Cuff: That is all.

[fol. 342] THOVILLE SMITH, being called as a witness on behalf of the defendant, was duly sworn, and testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Speak up loudly, please, captain so that the last juror can hear you. What is your occupation?
A. Master mariner.
Q. And what licenses do you hold?
A. A Master's license.
Q. Any ocean, any tonnage?
A. Yes, sir.

Mr. Cuff: I submit that is enough to qualify him. Any ocean and any tonnage and I presume that in any kind of water.

Q. How long have you held this master's license?
A. Four years.
Q. And before that you had first mate's license, I suppose, and second mate and third mate?

A. Yes, sir.

Q. Well, how long have you been going to sea, all told?

A. Thirteen years.

Q. And are you at the present time master of the steamship Alpha?

A. Yes, sir.

Q. How long have you been master of the steamship Alpha?

A. Close to three years now.

Q. And were you master of the Steamship Alpha on February 5th and 6th, 1927?

A. Yes, sir.

Q. Do you recall February 5th, 1927, while your vessel was lying at the port Venezuela?

[fol. 343] A. Yes, sir.

Q. Well captain, first of all describe for us when you attempted to sail, what orders you got, and when you actually did sail?

A. Well, I intended to sail about seven o'clock, I thought that we would be finished loading about six, and we would have been ready to sail about seven but they slowed down the cargo and I did not get through until around ten o'clock, and then they delayed my papers until the next morning. They kept promising them to me but it was after two o'clock, and then they decided to give them to me the next morning.

Q. At supper time did you make any announcement to the officers in reference to sailing?

A. Yes, sir.

Q. Well, what did you say?

A. To be ready to sail about seven.

Q. What formalities are necessary to clear a vessel after a cargo is loaded?

A. Well, they just generally give you the figures of your cargo amount, all the cargo carried, and then you have to get the customs papers, and the amount of cargo must be on that. Therefore they cannot give you the papers until you are finished loading.

Q. Well, how long does it take after the cargo is loaded before the vessel can sail. I am now talking about this place where you were in Venezuela?

A. Well, down there, about an hour.

Q. Where do the papers have to be sent?

A. The papers have to be sent to a place about 20 miles along the coast. At a clearing port. Where we were there [fol. 344] are no authorities there, and they have to send the papers 20 miles up the coast, to this clearing port.

Q. Do I understand you correctly that you said that after the cargo was loaded you have to send the papers 20 miles away to the consul's office or some place like that?

A. No, no, not after it is loaded, but the ship's papers go there, and they are sent back and after it is loaded they put the amount of the cargo in. The customs officer signs the papers 20 miles away.

Q. Well, now after the cargo is loaded do you have to figure out the amount of your cargo?

A. Yes.

Q. And does that take much time?

A. To figure out the cargo, yes.

Q. What is the custom when you in an oil port like this one, with reference to calling the people on shore?

A. Well, when we are finished loading we blow a whistle so that they will stop oil from coming in. That was the signal down there for everybody to come back.

Q. And after the steam whistle is blown, as a general rule, how long is it before you sail?

A. Generally about an hour.

Q. And that whistle tells the people on shore to come back?

A. They all mostly know it. That means we are finishing loading and will sail right away.

Q. Do you recall having seen the plaintiff, Mr. Cain, on the afternoon of February 5th, at all?

A. Well, I cannot recall having seen him. I may have, and I may not have, I do not know.

[fol. 345] Q. Well, it has been testified to here, captain, that on the afternoon of the 5th, some time around three o'clock, you were in a position amidship where you could see Jackson who was sitting on the hatch on the after part of the vessel, and that Jackson was drunk. Did you see Jackson that afternoon?

A. I am positive that I seen him somewheres on the ship, but I do not know whether I saw him on the poop or not.

Q. Do you recall having any conversation?

A. Yes, he was amidship several times. I cannot recall any conversation but I am sure that I seen him close enough to tell——

Q. On the afternoon of February 5th was Jackson sober or drunk?

A. He was sober.

Q. Do you recall having seen Mr. Cain about on o'clock A. M. or thereabout on the morning of February 6, 1927?

A. Yes, sir.

Q. Will you state to the Court and jury the circumstances under which you saw Mr. Cain?

A. Cain came up to my room. I was sitting inside the office and there is a screen door leading outside. The screen door was closed and locked. He came there and knocked on the screen door, and I went back to the door but I did not open it. I said to him, "What is the matter." And after I asked him what was the matter; he said that the first assistant hit him on the head with a hammer.

Q. The first assistant?

A. Yes. He was all drenched with blood. I says come on down in the salon and I will dress you and fix you up. I intend to dress him wherever he was cut. He was full of [fol. 346] blood and I could not see just where he was cut, so he turned around and walked down outside of the housing. I went into the salon from the stairway, or passageway, there is direct passageway from my room to the salon, while Cain, he went into the salon from the outside, and when I got there I could not see where he was cut, so I took some water and a towel, in the salon, and started washing his face and head. Then I called for the steward of the ship.

Q. Do you remember the name of the steward?

A. Yes, sir, I think his name was Stenbark, or Stenmark, or something like that.

Q. Where is he now?

A. On the Steamship Burdell.

Q. Well, where does she sail from?

A. She was in New Orleans about a month ago, and then I got a letter from him from Port Arthur.

Q. Go ahead?

A. Well, I could not get the steward out. He was asleep and his door was locked.

Mr. Cuff: At this time, your Honor, I move to strike out the testimony having to do with Mr. Stenmark.

The Court: It is too late now.

Q. Go ahead.

A. Well, I went looking for some bandages. I had a bottle of iodine, and I wanted bandages, and I went looking for some when I could not get in the steward's room, and when I came back Cain was in the salon and there was a big bunch in there, and he had fainted. I laid him out on the [fol. 347] floor and we started to dress his wounds. There was too many in there to do anything so I just——

Q. Was the first assistant engineer in there?

A. Yes, sir, I think he was there.

Q. Well, was the second assistant there?

A. Well, he came there at one time while the crowd was there.

Q. All right.

A. Well, we set him in a chair and finished washing the blood off his face and we bandaged his head. Then I took him out of there and started him to his bunk. Well, I mean to say when I came back with the bandages there was such a crowd there that I ordered them all out of the salon. Anyway I took him out of there after I had finished bandaging his head and I started with him to his bunk forward in the fo'castle. Just as I got past amidship, past the amidship housing, I was walking along with him when two sailors came up and they said they would take him along. They looked fairly husky there and so I gave him to them and they took him along.

Q. Well, after Cain had told you the first assistant had hit him with a hammer, did he say anything about the second assistant?

A. In the salon he said the second assistant hit him with a hammer.

Q. Did he say the second assistant hit him with a hammer?

A. Yes, and then he turned around and said that he hit him with a monkey wrench or a stilson wrench, some kind of a wrench, I don't remember which.

Q. Now after this episode, did you have any conversation with Cain about the accident?

[fol. 348] A. Yes, sir.

Q. That was the next day, was it?
A. The next morning.
Q. The morning of the 6th?
A. Yes, sir, after we left.

By the Court:

Q. The same morning after you left?
A. Yes, sir.

By Mr. Wolfe:

Q. Well, will you state what the plaintiff said to you and what you said to the plaintiff about the accident?
A. Well, I told the steward to dress him when I came down from breakfact, and I told the steward to dress him. I was eating breakfast and I walked out when I finished the breakfast, and the steward was cutting the hair on his head and fixing him up. I said to Cain, What really did happen last night, do you remember? He said yes, I was drunk and fell down, that is all that I know.
Q. Well, when you say Cain came to you at one o'clock, when you saw him at one o'clock, what was his condition, captain?
A. Well, you could not tell after a man was bleeding like he was but you could smell the liquor on his breath. When I was dressing I could smell it on his breath.
Q. Well, when you say you saw Jackson and Pankor on the morning of the 6th, what was their condition?
A. They were both sober.
Q. Is there any question in your mind about that, cap-
[fol. 349] tain?
A. None at all.
Q. When you saw Jackson and Pankor on the morning of the 6th of February around one o'clock, they were sober?
A. Yes, sir.
Q. Now the following day, did you make any investigation of these charges which Cain made against the first and the second assistant engineers?
A. Yes, sir.

Mr. Cuff: I object to that as calling for a conclusion.
The Court: Objection sustained.

Mr. Wolfe: If your Honor please, the captain here is charged with failing to make an entry in the log book of an alleged assault. Whether or not the captain is guilty of the violation of the statute I am trying to——

The Court: All right, you may go ahead.

Mr. Cuff: We don't mind him saying what he did to make the investigation——

The Court: He may answer. Objection overruled.

The Witness: May I answer?

Mr. Wolfe: Yes, go ahead.

The Witness: Yes, sir.

Q. Will you state what you did?

A. I talked to Jackson and Pankor and Miller, and the steward of the ship and several others. I do not recall who they were though.

Q. Did you talk to Stewart, the man who testified for the plaintiff?

[fol. 350] A. Yes, I talked with him that night after I left Cain. After Cain had gone to his bunk.

Q. Now, after talking to these people, captain, what conclusion did you come to in regard to the assault?

Mr. Cuff: I object to that.

The Court: Objection overruled.

Mr. Cuff: Exception.

The Court: What conclusion did you come to about the assault?

The Witness: That Cain was drunk and had fallen down. That is all I could draw from what I heard from everybody.

Q. Did you come to the conclusion that the assault had not been committed or that it had?

A. My conclusion was that the assault had not been committed.

Q. Well, you know, captain, do you, that you are supposed to make entries in the log book of all assaults happening aboard a vessel?

A. Yes, sir.

Q. Did you make such an entry in the official log of the vessel?

A. No, sir.

Q. Will you state to the Court and jury why you did not?

A. Because there was no assault committed so far as I

could gather, and if I had been putting in any record in the book at all it would be to log Cain for disorderly conduct and drunkenness.

Mr. Cuff: I move to strike out the answer.

[fol. 351] The Court: Strike it out, the latter part.

Q. If you had made an entry in the log book you would have——

The Court: I have sustained an objection to that.

Q. Cain has testified, captain, that he is no longer able to follow his calling as a fireman. Will you state whether or not in your opinion a man is prevented from following his calling, his calling as fireman, by virtue of the fact that he has lost the sight of one eye?

A. No, I have seen firemen with only one eye, and with one eye completely knocked out.

Q. Well, in your opinion is Cain able to follow the calling of firemen at sea?

A. Yes, sir, he is.

Q. Any doubt about that in your mind?

A. No, sir.

Q. Did you talk with Jackson and Pankor on the early morning, somewhat after one o'clock on the early morning of the 6th of February?

A. Yes, sir, after this thing was all over.

The Court: After Cain had gone to bed?

The Witness: Yes, sir.

Q. Is there any doubt in your mind, captain, as to their sobriety?

A. No, sir, none at all.

Q. Are you familiar with Pankor's reputation aboard that vessel?

[fol. 352] Mr. Cuff: I object.

The Court: The objection is sustained.

Mr. Wolfe: Exception.

Q. Will you state what Pankor's general reputation is with respect to sobriety or drunkenness?

Mr. Cuff: I object.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. He is a sober man.

Q. Well, will you state what Jackson's general reputation is with respect to the sobriety or drunkenness of the man?

Mr. Cuff: I object.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. I only was with him about 20 days, but as far as I could see——

The Court: No, no, no, if he had a general reputation for either drunkenness or sobriety.

The Witness: No, he was not drunk as far as I could see.

Q. Did you ever see Jackson drunk at any time?

A. No, sir.

Q. Did you ever see Pankor drunk at any time?

A. No, sir.

Q. Did you ever see Jackson take a drink?

A. Not that I can recall.

[fol. 353] Q. Well, now on the afternoon of the 5th you were ashore at port, were you not?

A. Yes, sir.

Q. And who went with you?

A. Well, my wife, Mr. Pankor, and Mr. Woodbury. We met them on the dock. My wife and I were going ashore and we met them on the dock and we went together as far as the beach and set there about an hour and came back.

Q. Well, what was Pankor's condition at that time?

A. Sober.

Q. Well, what was Woodbury's condition at that time?

A. Sober.

Q. Did you stop anywhere on the beach for a drink?

A. No, sir.

Q. What is the reason, captain, that you did not sail until eight o'clock in the morning, or whatever time it was?

A. It was around 6:45. It was on account of my papers. They did not bring me my papers. I would have sailed after they finished loading, but they did not get the papers until six in the morning. I did not get them until six o'clock and we sailed about 6:45.

Q. Was Jackson on duty in the afternoon of February 5th, 1927?

A. Yes, sir.

Q. Will you explain to the Court and jury what the custom is with reference to standing sea watches when the vessel is in port?

Mr. Cuff: I object to what the custom is.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. Well, they generally don't stand any sea watches in [fol. 354] port. One man generally takes it over. If there is work to do, then all three are down in the engine room doing it. When the work is over, one man will stay there and the rest will take the day off and do what they want to do.

Q. Will you state whether or not Mr. Cain stood his watches after he got out of his bunk, after the accident?

A. What is that?

Q. Did Cain stand any watches after the accident?

Mr. Cuff: I object.

The Court: It has been already testified to that he missed five watches and then he stood his watches.

Mr. Wolfe: I have asked him whether or not he stood any watches after the accident.

Mr. Cuff: Yes, and I object. That would include the whole trip back to New York.

The Court: It has already been testified to but I will overrule the objection.

Mr. Cuff: Exception.

The Witness: May I answer.

The Court: You may.

The Witness: Yes, sir, he stood the watch coming back. The second day he went back on watch of his own accord and stood watch until we got here. Then he stayed a day after that.

Mr. Wolfe That is all.

[fol. 355] Cross-examination.

By Mr. Cuff:

Q. When you first saw Cain, he was drenched with blood, wasn't he, on the morning of February 6th?

A. Yes, sir.

Q. Did he have anything else on him besides blood?

A. Well, he had his clothes on.

Q. Anything else besides his clothes?

A. I cannot say. I don't know what you are trying to get at.

Q. I would like you to make your answers without trying to guess what I am trying to get at. Was there anything else, similar to blood, on him?

A. Not that I recall. Blood is all that I could see.

Q. And he was not drenched with water?

A. I said blood. If he was drenched with blood you would not be able to see water.

Q. Well, he was not drenched with water, was he?

A. No.

Q. Did you hear Jackson say that he threw a pail of water on him a minute before you came in?

A. I had seen Cain. Cain came up to me, to my room before he went to the salon.

Q. Well, when he went down to the salon was he covered with water?

A. Well now, can I explain that?

The Court: You can.

The Witness: Well, after I tried to wash some of the blood off Cain in the salon, I went out to get the steward. I left Cain there, he was laying out on the floor, as he had fainted. I walked out to get some bandages. When I [fol. 356] came back, that is the time that Jackson had been in and put water on him.

Q. Now, the first thing, you said he told you was that the first assistant hit him on the head with a hammer?

A. Yes, sir.

Q. And then what did he say next about being hit?

A. That was on my deck, up on the top deck, that he told me that the first assistant had hit him with a hammer, and later he told me in the salon that the second had hit him with a hammer.

Q. Did he only tell you that once that the second hit him with a hammer?

A. What is that?

Q. He told you first that the first assistant hit him with a hammer, and the next thing he told you about being hit with that the second assistant hit him?

A. With a hammer, yes.

Q. That is right?

A. He may have said something else, I do not remember.

Q. I mean about being hit by somebody. That was the first thing he said?

A. Yes, sir.

Q. And he told you just once, in the salon?

A. What?

Q. That the second assistant had hit him with a hammer?

A. Yes, sir.

Q. And just when did he tell you that?

A. In the salon.

Q. He just told you that once?

A. Yes.

Q. Well, now on page 379, you are answering a question which was asked of you in this thing and the question was:

[fol. 357] "Q. He went on the outside?

A. He went on the outside stairway and I got down in the salon and he stood up, and he was all drenched with blood. I started to wash him off to find out. I could not see where the cut was so I started to wash him off and in the meantime I tried to get the steward. I called for the steward because he had a medicine chest in his room. There was a bottle of iodine that I had got, I had a bottle of iodine in my own room. I had gotten that before he came down so I washed him and poured the iodine on it and when I did he fainted, so somebody helped me, I don't know who it was. There was three or four in the salon, I do not know who it was that helped me. We took him and put him in a chair and put some more water on him and revived him. Then he said the second assistant had hit him with the hammer again."

Now, captain, do you remember making that answer to that question?

A. Yes.

Q. Now, you said that he told you again that the second assistant hit him. Do you agree with that now?

A. Well, that again didn't go in there.

Q. You say it is not correct in here?
A. He said somebody hit him.

The Court: Is this the only place that this witness said at the last time where he was told about this. Is this the only place?
Mr. Cuff: The last sentence is.
The Court: Now you have read it, and he has answered. Let us get on.

[fol. 358] Q. Now, what did you do with Cain after you finished dressing him?
A. I took him up past the amidship housing and then two sailors came along and got him and put him in his bunk, that is I believe they put him in his bunk.
Q. What reason did you have for turning him over to two sailors?
A. Well, I had other things to do.
Q. Well, he was in a sort of helpless condition.

The Court: Are you arguing again with him?
Q. Was he in a helpless condition?
A. No, sir, he could walk all right. I could have turned him loose but I did not take——
Q. He needed help, didn't he?
A. No, sir, I had taken a precaution, that is all. I took the precaution of having somebody go up there, or take him there myself.
Q. Wasn't one of the reasons why you turned him over to the two sailors, the fact that they were sober and pretty husky fellows, wasn't that the reason?
A. That was not the main reason.
Q. That was one of the reasons, wasn't it?
A. Well, they were able to take him up there, yes, but——
Q. That was one of the reasons, wasn't it?
A. Why, sure.
Q. Is there any log record of Cain's injury, anywhere?
A. Log record?
Q. Yes.
A. No sir.
[fol. 359] Q. The statement that Cain made on the boat you lost, didn't you?
A. I had lost it but I found it again.
Q. You had lost it and then you found it?

A. Yes, sir.

Q. Now, with respect to Cain's injury, and it was a serious injury, wasn't it, captain?

A. Well, it didn't look serious to me.

Q. Well, the cut on the main's head was so bad that he fainted?

A. Well, you can lose blood without really having exactly a serious cut or bruise.

The Court: That is argumentative.

Q. Well, you were surprised to know that he was at work two or three days later?

A. Yes, I had told him not to.

Q. Did he have a great loss of blood on the night of February 6th?

A. A pretty good deal, yes.

Q. You would not count that as a trivial injury, would you?

Mr. Wolfe: I object to that.

Mr. Cuff: I withdraw the question.

Q. Now, when you had Cain in the salon, he made these two charges, one against the first assistant and one against the second assistant.

The Court: He has not said that. He said he made charges against the first assistant upstairs.

Q. I see. Well, when you went in the salon with Cain and [fol. 360] the first and second assistant, you had heard from Cain that he said that the first assistant hit him with a hammer and that the second assistant had hit him with a hammer or a wrench, you had heard that, had you?

A. They were there when he said that?

Q. No. They were in the salon. Cain was in the salon, they were in the salon at one time?

A. Yes, sir.

Q. And before that, Cain had told you that the first assistant had hit him with a hammer and later on he told you that the second had hit him with a hammer or a wrench?

A. Yes, sir.

Q. So that you had the two men that were supposed to have hit Cain, and Cain in the room?

A. Yes, sir.

Q. And the injury was not a trivial injury, was it?

A. Now, as I said before, it did not seem to be very serious. I am not a doctor.

Q. Well, did you confront Cain with these two men and try to ascertain which one of them it was that did hit Cain?

A. No, sir.

Q. That is all the information you had up to that time, wasn't it?

A. Yes, sir.

Q. And you say this man was covered with blood, Cain?

The Court: Now you are arguing.

Q. And the next thing you did, you ordered the two engineers out of the room?

A. No, I did not order just the two engineers. I ordered everybody out.

Q. You ordered them out of the room?

[fol. 361] A. Not just them. I said everybody get out of here.

Q. Including the two men that Cain accused?

A. Yes, sir.

Q. Well, you made no inquiry whatsoever?

The Court: You are arguing again. Let us get ahead with the testimony.

Q. Now, Mr. Cain had a cut over his left eye when you examined his wound, didn't he?

A. No, sir, up in the head. It would be over the left eye but not right over it. It was in the hair line, inside the hair line.

The Court: Up on the skull above the hair line.

The Witness: Yes, sir, it was really over the left eye but away up.

Q. Well, now I read to you from page 433 of the testimony of the last trial.

"Q. Will you describe to the jury exactly where the wounds were that you found on his head in the vicinity of his eye when he first came up to you that night?

A. Yes, he had a cut over the left eye, over the left side of the head."

Now when you said that he had a cut over his left eye, do you now tel tell the jury he had a cut on the top of his head?

A. Yes. It is still over the left eye but it is up here (indicating hair line).

Q. That is the best description you can give where that cut was "Over the left eye."

[fol. 362] The Court: He did not say that.

Q. Did you say that is the best description you can give?

A. I imagine it is the fair description of it.

Mr. Wolfe: I think it is only fair to the witness, Mr. Cuff, that you read the next question.

Mr. Cuff: You can read it.

The Court: No, it is only fair to read it, the next question.

Q. Well, I will ask you this before I read the question.

Mr. Wolfe: Read the next question.

Mr. Cuff: I will in a minute, let me ask him a question.

Q. Now, I will ask you this before I read that question. You said that he had a cut over the left eye, over the left side of the head. By that did you mean one cut or two cuts?

A. One cut.

Q. Now, when you say he had a cut over the left eye, over the left side of the head—

The Court: In the hair.

Q. You were referring to one cut or two cuts?

A. One cut, that is all.

Q. Now captain, when a man is cut over the eyebrow, would you describe that as being over the left eye?

A. Sure. Anything over his left eye, up to the top of [fol. 363] his head, I would call it over the left eye.

Q. Well, that was over the eyebrow and you would call that over his left eye, wouldn't you?

A. Yes.

Q. But you did say a bump over his left eye, didn't you?

A. Yes.

Q. A bruise?

A. Yes, but that was all in one. It was a bump, a sort of a bruised bump.

Q. Did Cain have any permission to go ashore on February 5th, from you?

A. No, sir.

Q. Now after this boat, the Alpha, landed in New York, did you ever see the second assistant Jackson again until last May?

A. Until the last trial, no, sir, I did not see him.

Q. No person on the boat was supposed to get your papers, your clearance papers?

A. What person?

Q. Yes.

A. Nobody but myself to get the papers. I don't go ashore for them, they bring them to me.

Q. Now, as late as March 14th you took Stewart, the seaman, you took his statement, didn't you?

A. No, sir, I never did.

Q. Well, it was taken on the boat, wasn't it?

A. I did not see them take it.

Q. Didn't you know that it was taken?

A. I heard that it was.

Q. You know there was such a statement?

A. Taken, yes.

Q. Well, you knew that Stewart said, on March 14th, that on February 6th Cain told him the second engineer had hit him?

A. I did not know it. I never seen the statement.

Q. You never read it?

[fol. 364] A. No, sir, I never saw it.

Q. But you tell us you made an investigation to find out what happened to Mr. Cain?

A. Yes, but it was a verbal one.

Q. You had a statement written by Stewart and you never read it?

A. I never said anything like that. I said I asked verbally. I made an investigation verbally, I never got any report from anybody on paper.

Q. There was a statement written by Stewart, wasn't there?

A. I don't know, I have admitted that before.

Q. Now, when Jackson stated that Cain fell and hurt himself to you, that is what he did, didn't he, didn't you say to Jackson in the presence of someone of your seaman, "That man never got that injury from a fall"?

A. Will you read that over again?

Q. (Question read.)

A. I never made any such statement.

Q. Did you say to him, "That he has been hit with a wrench or a hammer or some metal instrument"?

A. I never made any such statement.

Q. Now captain, you know what this book is, this official log, don't you?

A. Yes, sir.

The Court: Has it been offered in evidence?

Mr. Cuff: It was offered in evidence but your Honor allowed the shipping man to go away, and Mr. Wolfe and I conceded that he could.

The Court: Very well, you may mark it now.

[fol. 365] (The above log book was received and marked Defendant's Exhibit C.)

Q. Now, this is a book that called for the report of the conduct of the members of the crew, doesn't it?

A. Yes, sir, among many other things.

Q. It does?

A. Yes, sir.

Q. And it also calls for a report and statement of every case, illness and injury happening to any member of the crew, with the nature thereof and the medical treatment. It called for that, didn't it?

A. Yes, sir.

The Court: At this time, gentlemen, we will take a recess until two o'clock P. M.

(Recess was hereupon taken until two o'clock p. m.)

Afternoon Session, 2:00 p. m.

THOVILLE SMITH, recalled, having been previously sworn, further testified as follows:

Cross-examination.

By Mr. Cuff:

Q. This book that I was speaking to you about, captain, that book is furnished by the United States Government, isn't it?

A. Yes, sir.

[fol. 366] Q. And goes with each voyage, each ship out of the United States, American ships?

A. Going out, yes, sir.

Q. Well, Cain had an injury, didn't he?

A. Yes, sir.

Q. There is a space here for the entry of the facts concerning said injury, is there not?

A. Yes, sir.

Q. Did you make that entry?

A. No, sir.

Q. There is also a space here after Cain's name under the heading of "Report of character." That is subdivided into conduct and ability. Do you know what you marked him for conduct and ability?

A. Yes.

Q. What did you mark him?

A. V. G.

Q. What does that mean?

A. Very good.

Q. That is the best mark he could get, isn't it?

A. It is.

Q. That is your signature there on top or the bottom of page 6 (showing witness log book)?

A. Yes, sir, that is my signature.

Q. There is no question about it that this man Cain is the man who is the plaintiff in this case, the same man?

A. No doubt?

Q. It is the same man?

A. It is.

Q. Now in the front of this book the United States Government has taken the trouble to set out the law, hasn't it?

A. Yes, sir.

Q. Have you read that at any time, captain?

A. Yes, sir, I have read it.

Q. You knew that the law required you to make that statement?

[fol. 367] The Court: He said that. He answered it. He read it. Let's get ahead.

Q. Will you state why you did not make that entry?

A. Well, I did not make the entry——

The Court: No, why, he asked you.

The Witness: Because there was no assault committed that I had made out, and if I had made any entry in that log it would have been to log Cain for being disorderly and drunk, and then describe the bruises and cuts that he had. Instead of logging him, I did not make any entry at all.

Q. And in order not to do those things, you omitted it entirely?

A. Yes.

Q. So that now when we come to trial, come to the trial of this case, we have a blank page——

The Court: This is argumentative. Let's get ahead.

Q. Now have you ever, on any boat, made any record of an injury to a seaman?

Mr. Wolfe: I object.

The Court: Objection sustained.

Mr. Cuff: Exception.

Q. Now, captain, didn't you know that it was important to Cain to have a record in this book of an injury that he [fol. 368] sustained, the people who knew about it, their addresses and so forth?

Mr. Wolfe: I object.

The Court: Objection sustained.

Mr. Cuff: Exception.

Q. Now, captain, at any time did you ever bring Cain and the second assistant together and allow Cain to make a statement in the presence of the second assistant?

A. No, he denied it the next day, what was the use?

Mr. Cuff: I move to strike out the balance of the answer.

The Court: Strike it out.

Mr. Cuff: That is all.

Redirect examination.

By Mr. Wolfe:

Q. You stated, captain, that Mr. Cain had bruises above his left eye. Was the skin broken?

A. Yes, sir.

Q. At what place on Cain's head did you place the bandage?

A. Around this way (indicating).

Q. Over the left eye?

A. No, sir.

Q. Are you positive of that?

A. Positive.

Q. How far from the beach did you say the ship was docked?

A. Nine-tenths of a mile.

Q. Could you distinguish objects on the shore?

A. You could, houses and people, but from that distance [fol. 369] you could not tell whether they were men or women.

Q. You were asked what rating you gave Cain when he was discharged, and you said V. G.

A. Yes, sir.

Q. Did you also give the rest of the crew V. G.

A. Yes, sir.

Q. Is that the customary rating?

Mr. Cuff: I object to that. How does he know what the custom is?

The Court: Objection sustained.

Mr. Wolfe: Exception.

Q. Is the rating customary aboard ship?

The Court: How can it be the custom to give very good? It surely can't be the custom to give very good, otherwise there would be no sense in giving anything.

Mr. Wolfe: Does your Honor rule against me on that?

The Court: No, I will let him answer. Is the custom to give firemen and seamen very good.

The Witness: Only in exceptional cases where we give them fair, but as a rule we give them very good.

The Court: How many notations are there that you have besides very good, or how many ratings are there altogether?

The Witness: Three.

The Court: What are they?

[fol. 370] The Witness: Very good, fair, and the other one is not exactly fair. That is what it means but it doesn't say that.

The Court: What is it?

The Witness: Well, now, I don't exactly remember, it is in the log book there, you can see for yourself.

Q. Under what circumstances do you give a man very good?

The Witness: As long as he has done nothing real bad. Cain had not done anything bad so far as I could see, except to get drunk.

Q. Under what circumstances do you give a man fair?

A. Oh, fellows fighting and who don't want to work, things like that, we generally do.

Q. Under what circumstances do you give the third rating?

A. Oh, when we have to keep them in irons, most of the trip, when they don't want to work.

Mr. Wolfe: That is all.

Recross-examination.

By Mr. Cuff:

Q. Now, captain, you say there are three different rat-
[fol. 371] ings?

A. If I could recall correctly.

Q. And you have to make a report out at the end of each voyage?

A. About what?

Q. About the conduct of the men on the boat?

A. Yes.

Q. And are there three ratings, captain?

A. Yes, that I recall. You can look right there in the book and see for yourself if there is any more.

Q. You don't know whether there are any more or not?

A. Yes.

Q. Well, you don't know if there are three, do you?

A. I just said I did.

Q. Well, name them, captain.

A. Very good, fair, and the third is I. E.

Q. Captain, you don't know very much about the keeping of this conduct record of the crew at all?

A. Why?

Q. I am asking you, do you know very much about that?

A. According to my estimation, I do.

Q. You know all about it, do you?

A. Well, enough to satisfy me.

Q. Well, let me read to you what the ratings are printed in this book (Mr. Cuff reading from Defendant's Exhibit

C) V. G., G., M., and I. V. G. standing for very good. G. alone standing for good. M. standing for middling, and I. standing for idleness. Now does that refresh your recollection of what the characterization of the records of the conduct of men would be?

[fol. 372] A. Yes.

Q. Well, when you wrote very good alongside the names of Cain and Jackson and these other men, did you have in mind to protect the Alpha Steamship Company from some action of some kind?

A. No, I did not.

Q. Well, did you have in mind such a protection when you omitted to, in any way, make a report of this injury to Cain?

A. Did I have in mind what?

Q. To protect the company?

A. Oh, no.

Mr. Cuff: Tha'st all.

Mr. Wolfe: That's all.

Juror Number One: Just a minute. May I ask a question?

The Court: Certainly.

By Juror No. One:

Q. What did the seaman, Stewart, report to you about this happening, and when? I think the question was asked but I did not understand it clearly.

A. I do not think that they let me answer it.

Q. Well, can you answer it now?

The Court: He may go ahead.

A. When I came up on deck, after getting Cain to bed, I went up to my room and looked down at the next deck, and when I did I could see Stewart. And I says to Stewart, did you see Cain come up the deck a minute ago and did he hurt himself or did Jackson hit him. He said I seen Cain coming on the poop. He was running by me and he tripped over [fol. 373] several times, but he got amidships. He says he fell several times. He says he is drunk, that is all that is the matter with him. He is getting crazy from drink.

Juror Number One: That is all.

COLLOQUY RE TESTIMONY OF CHARLES STENMARK

Mr. Wolfe: With your Honor's permission, at this time I will read the testimony of Charles Stenmark, his testimony at the last trial.

Mr. Cuff: We object to that, your Honor.

The Court: Objection overruled.

Mr. Cuff: Exception.

(Mr. Wolfe reads the testimony of Mr. Stenmark taken at the last trial.)

(During the reading of the direct examination the following question was read: "Can you state whether or not you observed any evidence of a physical wound to the eyebrow itself?")

Mr. Cuff: We object to that, your Honor.

The Court: The objection is overruled.

Mr. Cuff: Exception.

(Mr. Wolfe continues the reading of direct examination.)

(Cross examination read by Mr. Cuff.)

[fol. 374] MILTON BERLINER, being duly called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Now, doctor, will you speak as loud as you can? Are you a duly licensed physician and surgeon in the State of New York?

A. I am.

Q. Will you give the jury your medical education and tell what hospitals or institutions you are connected with?

A. Well, I graduated in 1917, and after that——

The Court: I can't hear you, and I am sure the jury cannot hear you, and it doesn't do a particle of good unless they can.

The Witness: Well, I went into the army in 1918 and came back in this country and I started specializing in the eyes.

The Court: Doctor, talk out. We cannot hear you.

The Witness: That is the best I can do.

Q. Go ahead.

A. Well, in 1919 I went to Vienna, Austria, and I spent a year there. I then returned and joined the staff of the Cornell Medical College where I am an instructor of diseases of the eye. Also the New York Eye & Ear Infirmary, where I am an assistant surgeon, and the Institute for the Con-
[fol. 375] servation of the Blind in Pelham.

Q. Do you specialize in eye work?

A. Yes.

Q. Were you, in 1927, the consultant in the United States Marine Hospital, Staten Island?

A. Yes, sir.

Q. And did you at the request of the United States Government authorities examine the plaintiff in this case in 1927?

A. I did.

Q. Will you state the examination that you made, when you made it, and what you found at that time?

A. I made the examination on February 2nd, 1927. I saw this man once, I think.

The Court: February 2nd or March 2nd?

The Witness: That is the date on the history.

The Court: Well, you had better get the history.

Q. Did you make any report?

A. Yes, sir.

Q. I show you this sheaf of papers and ask you what that is.

Mr. Cuff: I object.

The Court: Objection overruled.

Mr. Cuff: Exception.

A. That is the clinical record of the Marine Hospital in Staten Island.

Q. Did you make a report and put it in this record?

A. Yes, sir.

The Court: Is this your record?

[fol. 376] The Witness: Yes, sir.

Q. Will you state what examination you made and what you found?

A. I examined this man on February 2nd, 1926, at the Marine Hospital.

Q. Just look at that date again, will you?

A. February 26th, 1927. At that time I made the following notes on this chart.

The Court: What did you find?

The Witness: May I read this over?

The Court: Yes, and tell us what you found.

The Witness: At that time I found that this man had an inflammatory condition in his left eye and had chronic uvietis with a cataract formation in that left eye, and I made a note and also wrote it down here, to the doctors——

The Court: Don't tell us that.

The Witness: I found at this time that this was an inflammatory process due possibly to tuberculosis process in this man's eye.

Q. Now will you state what you mean by chronic inflammatory process?

Mr. Cuff: At this time I move to strike out that part of his answer wherein he said it was possible.

The Court: Strike it out.

The Witness: What was the question?

Q. Now will you state what you meant by chronic inflammatory process?

[fol. 377] A. It is a condition which has been of long standing, inflammation in the eye, and as a result the nutrition to the eye becomes very poor, and following this, cataracts develop. In addition to this, we make a differentiation between a cataract due to disease and a cataract that comes on old people from age, and a cataract due to injuries, and this type of cataract was one that came under the heading of a disease in the eye caused by certain spots and inflammatory signs in that eye, so I put it down as——

Q. No. After examining, doctor, did you come to the conclusion that he was suffering from a traumatic or non-traumatic cataract?

A. A non-traumatic cataract.

Q. And did you get the patient's injury?

A. Yes.

Q. And did he tell you——

The Court: You must tell us what he told you.
Mr. Wolfe: Yes, I guess that is right.

Q. Will you tell us what the plaintiff told you?

The Court: As far as you remember. If you had made any notation, you may look at it.
Mr. Cuff: His own notation.
The Court: Yes, your own notations.
The Witness: According to the history, two weeks previous this man had a blow to his eye. That was the history [fol. 378] I got at that time.

Q. And you were of the opinion that the blow was the contributing cause of the cataract?

Mr. Cuff: I object.
The Court: Objection overruled.
Mr. Cuff: Exception.

A. I was of the opinion that this cataract was not caused by a blow.
Q. Was not caused by a blow?
A. No.

Mr. Wolfe: That is all.

Cross-examination.

By Mr. Cuff:

Q. Now, doctor, I could not hear you very well when you said about the institutions that you were connected with?
A. Cornell University——
Q. No, just tell me this much. I assume that you are a doctor. What institutions have you been connected with and for how long?
A. The New York Eye & Ear Infirmary and the Cornell——
Q. How long were you with the Eye & Ear Infirmary?
A. Eight years. And the Cornell Medical College, Department of Diseases of the Eye for eight years.
Q. Is that the same eight years?
A. Yes.
Q. That is not sixteen years altogether?
A. No.

Q. You are a doctor of the New York Eye & Ear Hos-
[fol. 379] hospital?

A. I was a doctor. I graduated in 1917 and I joined it in 1920.

Q. Well, doctor, can you distinguish between a traumatic and a non-traumatic cataract after the cataract is fully developed?

A. Yes, sir.

Q. It doesn't matter how long it is developed, you can tell the difference?

A. Yes, sir.

Q. Doctor, let me tell you this——

The Witness: May I be allowed to ask a question?

The Court: Yes.

The Witness: Are you considering me as an expert or just as a witness?

Mr. Cuff: You are being considered as an expert, I presume.

The Witness: I just wanted to know whether I was testifying as an expert or whether the fact that I am just here with these records, or whether I am a witness to show this report, or if I am testifying as an expert.

Q. You are asking me a question that you should ask your counsel Mr. Wolfe: I really do not know. But may I ask you this question: can concussion cause cataracts?

A. Concussion where? Concussions is a very weak term to use. You do not say what kind of a concussion that you mean. Concussion to the brain, concussion to the eye, to the head, to the leg——

Q. The text book by Fuchs speaks of concussion. That is the concussion that I mean.

A. Well, have you got that text book with you and will you show me that notation so that I know what you are [fol. 380] talking about?

Q. Well, I have the text book, but I am not going to show you the book at this time. I am asking a question.

A. Well, I would like to see the text book. There are nine editions to that book, so if you can produce the text book and tell me——

Q. Doctor, it is exactly the same text book that we had in the last trial.

A. Well, I think that was an obsolete text book at that time.

Q. The text book that Doctor Bishop had here was obsolete?

A. Yes, that was not the last edition.

Q. Now can't you answer that question as to whether or not concussion can cause a cataract, without looking at the book?

A. Well, the question is too general.

The Court: Is the question too general?

The Witness: Yes.

The Court: Is there any question that some concussion can cause cataracts?

The Witness: Well, he might try to catch me in a thing like that.

The Court: That is all that he asked you, is there some concussion that can cause a cataract?

The Witness: Concussion directly to the eyeball will produce a cataract, yes.

Q. Now the text book that we read from, doctor, the work by Fuchs, we read from the top of page 454. Is that the book that you say is obsolete? Is that obsolete?

A. Yes, sir, practically. After there are later editions, [fol. 381] the book is not considered an authority.

Q. What is the difference in the two editions on that particular point about concussion causing cataracts?

The Court: What are you asking him now? He has answered your question.

Mr. Cuff: I am not going to ask him anything more about it.

Q. Do you admit that at the last trial you testified that concussion alone could not cause cataracts?

A. Do I admit what?

Q. Do you admit at the last trial you testified that concussion alone could not cause cataracts?

A. I don't remember that very well.

Q. You don't remember?

A. No, I would not like to say about the last trial. I don't remember exactly what I did say. If you have it there, I can read it.

Q. Now does the eyeball have to be hit to cause cataracts?

A. Well, there is still some question about that. Some authorities differ. Some uphold that an indirect blow to the head can cause cataracts, and others hold that it is a question whether or not it is possible. It is thought that if that were possible there would be more people with cataracts, for everyone who got a blow on the head would receive cataracts on the eye.

Q. Do you remember this answer to this question in the last trial—I am reading from page 363:

[fol. 382] "Direct blow to the eyeball, you mean?

A. Yes, a direct blow to the eyeball can cause cataracts.

Q. It must hit the eyeball?

A. Yes, it must hit the eyeball."

Do you remember making that answer?

A. Yes.

Q. Well, have you changed since then?

A. No, I have not changed, certainly not.

Q. Now, do you agree with this. I take this from the same work of Fuchs, this statement, "That it is also a fact that inter-ocular opacity is caused by simple concussion without opening the capsule." Do you agree with that statement?

A. That will have to be clarified before we can agree with it.

The Court: How?

The Witness: Well, you can have a capsule open by only a direct blow to the eye itself. The capsule of the lens which is inside the eyeball.

Q. Now, doctor, you examined a great many patients at the Marine Hospital, didn't you?

A. I examined a great many, I suppose so.

Q. How many would you say in a day?

A. I have no idea.

Q. Now do you examine patients for any steamship company?

A. I do not.

Q. Now when I tell you that both Doctor Bishop, for the Plaintiff, and Doctor Collins for the defendant, have said

that you could not tell a traumatic from a non-traumatic [fol. 383] cataract, a fully developed cataract, would you change your answer?

A. Yes, I would qualify that, because in the last two or three years we have had an invention of a new instrument called a slit lamp, and we have been able to make that examination.

The Court: You mean that you would qualify what they said?

The Witness: Yes, sir.

The Court: What is that new invention?

The Witness: A slit lamp. It is a powerful lamp.

Q. Doctor, what is chronic uveitis?

A. Uveitis you call that. And inflammatory condition in the eyeball which affects the ciliary body and the iris.

Q. Well, that inflammatory condition usually follows a blow in the eye?

A. Not necessarily.

Q. I said ordinarily.

A. No, not ordinarily.

Q. Well, do you tell us now that when a person gets hit in the eye it does not become inflamed?

A. Maybe inflamed but not uveitis.

Q. Well, that is all uveitis, isn't it—inflammation?

A. Yes, of certain parts of the eye. A blow to the eye doesn't cause uveitis.

Q. Well, if I tell you that Doctor Bishop says that chronic uveitis is caused by a blow in the eye, would you agree with that?

A. I disagree with that absolutely.

Q. Do you know Doctor Bishop?

A. I know him personally.

[fol. 384] Q. He is an expert, isn't he?

A. He is a good eye man, I don't know about an expert.

Q. Well, he is an eye specialist, with a very good reputation, isn't he?

A. He is a very good specialist, yes.

Q. Now, Doctor, was Cain's eye inflamed when you examined him?

A. At the time I examined him? Do you mean when I examined him on February 26th?

Q. How many times did you examine him?

A. Once.

Q. Yes.

A. Well, do you mind if I look at the records?

Q. Well, without looking at it can you remember it?

A. (Witness examining record) I have looked at it now. It is too late.

Q. I thought you said you had looked at it.

A. I only saw this man once. At the time I examined his eye there was signs of an old inflammatory process.

Q. Please answer my question. Was Cain's eye inflamed at the time you examined him?

A. No, not acutely.

Q. Was it inflamed at all?

A. Not at the time that I saw his eye, no.

Q. You say you do not know how many patients you do examine?

A. A great many every day. From fifty to a hundred, maybe more every day.

Q. And you remember that now?

A. I am not certain, but I believe so.

Q. Now, doctor, you have stated that in your opinion that this cataract was a non-traumatic cataract?

[fol. 385] A. Yes, that's right.

Q. You still have that opinion?

A. Yes, I can't change my opinion. I saw the man once, for five or ten minutes. That was my opinion at the time. I can't change my opinion.

Q. Your opinion is yes?

A. Of course, I don't change my opinions.

Q. Did you say you had changed it?

A. I said how could I?

Q. Will you tell us what it is that indicated to you in this man's eye that it was a non-traumatic cataract?

A. Well, two or three things. In the first place the condition of the eye at the time indicated that this inflammation had been of long standing, probably for several months or possibly years. I can't say exactly the length of time. By the character of his eyelids and also by the presence of spots on the back of his cornea. These spots, when clear, have a certain color, and when they are old they change in color. These spots when they are old show they have been

there for a long time by their color. That was one or two of the reasons that I came to that——

Q. Is that the only information you have on which to base that opinion?

A. What do you mean?

Q. Well, when you examined his eye, is that the only discovery you made in order to base your opinion that this man has a non-traumatic cataract?

A. That is the method we have of telling those things, by the condition of the iris, and the deposits, and the condition of any active inflammation itself.

Q. Are you just talking generally or about my question? [fol. 386] A. I am talking about your question. Whether the capsule is ruptured or not. The condition of the lens fibers and the tension of the eye.

Q. Let me read your answer to that same question at the last trial. Do you remember making this answer to the same question. I am reading from page 9 of your testimony:

"Q. Upon what do you base that opinion?

A. The man had a cataract in his eye and the eye was not inflammed at this time but he had what is known as certain deposits in the front part of the eye which is one of those important factors that makes for the diagnosis of a disease in the eye and any injury outside, and these deposits were brown and not gray."

Do you remember that?

A. That is just what I said.

Q. What is that?

A. That is what I just said.

Q. Let me read this to you:

"And the fact they were brown makes it a chronic condition and not an acute condition. In an acute condition these deposits are whitish, but after several months they become brown in color. I think now it was that point itself which made me believe it was a cataract due to a long-standing disease of the eye, and not anything that happened quite recently."

Q. Do you remember making that answer?

A. Yes, of course.

Q. You have not said anything about deposits here, you have said spots on the lens?

A. Well, I mean deposits; I wanted to make it clear for the jury.

[fol. 387] Q. It is still true that these deposits made you form this opinion?

A. Yes, partly, that is true, yes.

Q. Now, doctor, do you know that those deposits change from white to brown within two weeks from the time they occur in the eye?

A. That is not true.

Q. If I told you that Doctor Bishop testified to the fact would you still say it is not true?

A. Yes, sir, I would.

Mr. Wolfe: Doctor Bishop didn't testify so at this trial.

Mr. Cuff: He certainly did. I asked him all about it.

Q. I want to read you Doctor Bishop's testimony and ask you if you agree with this:

"Doctor Bishop, it has been testified to here by Doctor Berliner that he examined the plaintiff on February 27th and he said, I found that he had a low-grade chronic inflammatory process in his left eye. State whether or not in your experience in an inflamed condition of the eye such deposits are formed called precipitates and can be detected by an examination of the eye?

A. Yes, sir.

Q. What color are they?

A. The deposits when they are fresh are light in color, or white or grayish.

Q. What change in color of the deposits takes place subsequently, if any?

A. If they remain deposited on the back of the cornea they become brownish in color, that is, if they remain there for a sufficient length of time.

[fol. 388] Q. Well, how short a time after a blow such as you will assume in your testimony was received by the plaintiff Cain would such deposit appear?

A. They would make their appearance as soon as the inflammations develop.

Q. Well, how soon might that be?

A. That might be within a day or two.

Q. Now in how short a time would these deposits change color?

A. They would begin to darken within two or three weeks provided they remain that long.

Q. So that the change would occur in a shorter time than two weeks, in the color of those deposits?

A. Yes, sir."

—. Do you agree with Doctor Bishop?

A. I do not.

Q. They could not change color in that short time?

A. I do not agree with him.

Mr. Cuff: That's all.

Mr. Wolfe: That is all.

The defendant rests.

The Court: Any rebuttal?

Mr. Cuff: I have one or two short witnesses.

Robert Cain, recalled in his own behalf on rebuttal, testified as follows:

Direct examination

By Mr. Cuff:

Q. Mr. Cain, did you tell the captain the day after this [fol. 389] accident that you were drunk and fell and that is how you hurt your eye?

A. No, sir, I never saw the captain that day.

Q. Or on the day of the accident?

A. No, sir.

Q. Or at any time?

A. No time.

Q. Did you tell that to anybody?

A. No, sir—in the Marine Hospital——

Q. You worked in the boiler room and the engineroom, didn't you?

A. Yes, sir.

Q. Were there any repairs necessary in the boiler room and engine room when that ship reached Venezuela?

A. No, sir.

Q. So far as you know were any repairs made down there?

A. No, sir.

Q. Now this work which Jackson said that he did on the engine while it was at the dock in Venezuela. You know the name of that. What was the name of that work that he did?

A. Do you mean slowing the boilers down?

Q. Yes. Where was that work done?

A. That work was not done there.

Q. Well, where was it done?

A. On the homeward bound voyage to New York.

Q. Slowing the boilers down was done on the homeward bound voyage to New York?

A. Yes, sir.

Q. That could be done with the ship in motion, couldn't it?

A. Yes, sir.

Q. Now, Cain, when you are up on the top grating and look down, what do you see?

A. A platform.

Q. And when you look over the platform or opposite the platform, what do you see?

A. Well, you see about two feet from the—you can see [fol. 390] the shape of the telegraph (indicating).

Q. You can see the telegraph itself, can't you?

A. No, sir.

Q. Because that is like a clock right in front of it?

A. Right.

Q. But you can see the top of it from up above?

A. Yes, sir.

Q. There is nothing to obstruct your view from the top grating down to the platform of the engineroom, is there?

A. No, sir.

Q. Now, Cain, when you went to see Doctor Collins, tell the jury what you did in his office and what he did to you?

A. Well, Mr. Turner took me up to Doctor Collins' office. He took me into a room and looked into my eyes. Then he put some stuff in my eyes and sent me out to the waiting room again. I stayed there for ten minutes or so and he took me in again and examined my eyes again. He looked into my eyes and then he put some more drops in them and

sent me out in the waiting room again. I was there about ten minutes and then he took me in a darkened room, he took me in a room and pulled the curtains over, and it was a darkened room. And I stayed in there and then he gives me a cardboard and put it over my eye like that (indicating). He said, Do you see anything at all? I said, No, sir. Then he put the cardboard over my eye again and he says, Do you see anything? No. And I says, No, sir, I don't. Then he put it over again and he says, Do you see nothing at all? I says, No, sir. And then he kept it there about [fol. 391] three or four minutes and after that he says do you see anything now, and the room was all lit up.

Q. The room was all lit up when you took it off your eye?

A. Yes, sir.

Q. Cain, have you ever been able to see light from that eye alone from three or four days after this assault?

A. No, sir, I have not seen since.

Q. You have not seen any light from that eye from after three or four days after the assault?

A. No, sir.

Mr. Cuff: It is conceded that Mr. Turner is in the employ of Walker & Daly, is it, Mr. Wolfe?

Mr. Wolfe: I don't know anything about it.

Mr. Cuff: Very well, then, we will have to question the witness about it.

Q. That is the Mr. Turner who was with you?

A. Yes, sir, Mr. Turner is the man.

Q. Who is Mr. Turner?

A. The first man that I went to at 6 Pearl Street.

Mr. Wolfe: If he says that Turner took him, I will concede it.

Mr. Cuff: We want to prove that Mr. Turner is connected with the defendant. If they want to concede that all right, otherwise I will ask the witness. Doctor Collins testified that a Mr. Turner was along.

Q. Where did you see Mr. Turner?

A. Well, when I came out of the Marine Hospital I went [fol. 392] to Walker & Daly. They said go over to No. 6 Pearl Street. I went over there and waited, and then a Mr. Turner came to me and he says sit down there and you will see our doctor.

Mr. Cuff: That is all.

Mr. Wolfe: That is all.

Juror No. One: May I ask a question?

The Court: Yes.

Juror Number One: What is the reason you didn't stand your watch from twelve noon until four P. M. on February 5th?

The Witness: Well, I will tell you, sir. I got my own watch on the twelve to four, and the man that was ashore was not aboard, and I stood his watch from four to eight the next morning.

The Court: That means you were on duty from midnight of the 4th and 5th, down to eight o'clock in the morning, instead of getting off at four?

The Witness: Yes, sir. When I went ashore the next morning and I met this man, he says, Did you stand my watch? And I says, Yes. He says. All right, I will stand yours. Take your time coming aboard.

By Mr. Cuff:

Q. You worked eight continuous hours on the 5th of February, from midnight until eight A. M.?

[fol. 393] A. Yes, sir.

Q. Well, maybe we can identify this fireman. What fireman was it?

A. The four to eight fireman.

Q. Yes, but where did you see him?

A. I seen him on the shore, he has two black eyes.

Q. That is the fellow whose watch you did?

A. Yes, sir.

James B. Stewart, recalled on behalf of the plaintiff on rebuttal, testified as follows:

Direct examination.

By Mr. Cuff:

Q. Mr. Stewart, was there any repairs made in the engineroom or boiler room?

A. Well, really, I can not say for sure because I was not in that department.

Q. No. I asked you from the wrong notes. You were not a fireman, you were a seaman?

A. Yes, sir, on the dock.

Q. Well, now, I ask you this. Will you describe to the jury that staircase that goes down to the engineroom?

A. Yes, sir, I can describe it.

Q. In the first place, there is a word that has been used here. Housing on the deck over the staircase. That is known as the engineroom housing?

A. Yes. You see the engine room is housed up. There is [fol. 394] a roof on it. There is a roof comes up over the engineroom and down below is the engineroom. The door that you enter off the ship is facing this way (indicating), facing west, that is the way the boat was facing. That is the reason I say that.

And when you walk in the port door you find this walk-way clear across to the starboard side. There is another door on the starboard side in the same position as the one on the port side.

Q. When you say walkway do you mean grating?

A. Yes.

Q. With a space like this between them (counsel indicating railing around jury box)?

A. Yes, sir, something like that, only flattened out. I guess about a quarter of the way across after you get into the engineroom you find this ladder running down to the next place. All right, you go down and pass on an angle about like this (indicating), and there, when you get at the bottom step there is another walk-way or grating clear across, leading to the starboard side to get into the ice machine room on the portside. It leads to the storeroom down there.

Q. That is another grating similar like this railing?

A. Yes.

Q. Go ahead.

A. It is eight or ten feet from the other one, lower down.

Q. Next you have to go aft?

A. Yes. When you get there there is another flight of stairs going down the same way, right straight on down to [fol. 395] the storeroom, and when you get to the bottom of these stairs you are on the dynamo platform. The dynamo is there, and some oil containers. They are big cans for the oil, over on that side (indicating left). On the platform

are the dynamos and when you get on this platform, that is two flights down, instead of going down again, you turn and go on a ladder that goes right down in the engineroom. That ladder is straight. It is nearly straight up and down, I would say in an angle of about (indicating an angle of about sixty to eighty degrees), and when you get down to the bottom of that ladder you are down there with all the engines, you are on the bottom then.

Q. When you get down the last one you are going toward the bow of the vessel?

A. Yes, sir.

Q. And when you start down the top one you are going toward the stern of the vessel?

A. Yes, sir.

Q. Now as I have my hands here (counsel indicating), to look down to the tips of my fingers, is there anything to obstruct your vision?

A. Nothing, there may be a beam that runs across there down below, but there is nothing to obstruct the view from the top to the bottom.

Q. This is an entirely metal stairway?

A. Yes, sir.

Q. And from the construction that you have given us, it would indicate that there would have to be a space on both sides of it?

[fol. 396] A. Yes, sir, there is nothing there at all to keep one from looking down.

Q. Now, Mr. Stewart, with reference to that space, did you have an experience on the boat, with respect to a chain you were taking up through there?

A. Yes, sir, I did.

Mr. Wolfe: I object to that.

The Court: Objection sustained.

Q. Mr. Stewart, is there any particular reason why you know that you can see directly from above, down?

The Court: What is the difference, he says that you can.

Q. Mr. Stewart, did you ever tell the captain that Cain was drunk and fell and that is how he was injured?

A. No, sir, I never did.

Q. Now you made a written statement which is in evidence here, on March 14th, didn't you?

A. Just as I said before, here is my testimony the way I made that statement.

Q. Yes. But the date you made was the date, is on it I think, some date on it, is March 14th?

A. Practically, I can't say for sure.

Q. Well, when was the first time that you heard about Cain's lawsuit?

Mr. Wolfe: I object.

The Court: Objection overruled.

Mr. Wolfe: Exception.

[fol. 397] A. It was about December 27th.

Mr. Cuff: That is all.

Cross-examination.

By Mr. Wolfe:

Q. Did you ever talk with the captain about this case, yes or no?

The Court: You mean about the lawsuit or the accident?

Q. The accident, yes or no?

A. I would not hardly know how to answer that yes or no.

Q. Well, did the captain ask you anything how this accident happened, yes or no?

A. No.

Q. Never asked you a single thing about how this accident happened, yes or no?

A. No.

Q. At any time?

A. No.

Q. Referring to the construction of the engineroom, you are on deck, aren't you?

A. Yes, sir, I am on the deck.

Q. Do you know whether there is a large main steam line in the engineroom?

A. I know there is.

Q. Do you know its approximate size?

A. I do.

Q. Well, how large is it?

A. Just about that broad, approximately (indicating about 36 inches).

Q. Is it anywhere near the telegraph?

[fol. 398] A. Yes, it is.

Q. Well when you stand on the top grating do you see straight down and see the engineroom and the telegraph or do you look aft?

A. Not exactly straight down. Straight down from the top grating you see the after part of the engine, I mean the forward part of the engineroom where you get into the fire room.

Q. Can you look straight down from the top grating?

A. Practically so.

Q. Can you look down straight from the top grating?

A. No, not exactly straight.

Q. Well when look aft from the top grating how much of the engineroom do you see?

A. You can see the main part of the engineroom, two turbines and the reduction gears.

Q. Can you see the turbine casings at the reduction gears?

A. Yes, sir, not only the reduction gears——

Q. Well what does this steam pipe obstruct?

A. It goes from H. B. to L. P. turbine as an exhaust.

Q. What does it obstruct?

A. Whatever is in the line of this 30 inch pipe, that is all it could obstruct. Whether the telegraph is there or not, I don't know.

Q. Then you don't know whether you can see the telegraph from the top grating, do you?

A. You can see a foot and a half aft each way each side of it.

Mr. Wolfe: That is all.

[fol. 399] Redirect examination.

By Mr. Cuff:

Q. You are not in the steamship business now, are you?

A. No, sir.

Q. You don't go to sea?

A. No, sir.

Q. You didn't go anywhere after this trip, did you?

A. Yes, sir, I did, I made a couple of trips on the Leviathan.

Q. Well, did you make trips on other boats?
A. Yes, sir, a couple.
Q. But you are through with that now, are you?
A. Yes, sir, I am through.

Mr. Cuff: That is all.
Mr. Wolfe: That is all.

MATTHEW PANKOR, recalled in sur-rebuttal, testified as follows:

Direct examination.

By Mr. Wolfe:

Q. Mr. Pankor, Mr. Cain testified that on the morning of February 5th he stood the watch from four to eight A. M. Do you know whether or not he stood that watch?
A. I don't think he stood because the four to eight fireman called me at——

The Court: He says do you know whether he stood it or not.
[fol. 400] The Witness: I don't think so because the four to eight——
The Court: No, no, no. Do you know whether he did or not?
The Witness: He may have stood it on the 4th but not on the 5th.
The Court: Do you know whether on the 5th he stood the four to eight watch, do you know?
The Witness: I do not think he did. No, he did not.
The Court: Who did?
The Witness. The four to eight fireman.
The Court: The four to eight fireman?
The Witness: Yes, sir.
The Court: Were you down there yourself four to eight?
The Witness: No, sir, I was sleeping all night. I was in bed.
The Court: Well, how could you know?
The Witness: Well, he called me at seven o'clock in the morning.
The Court: Who called you?
The Witness: The other fireman.

The Court: What time did you get there?
The Witness: Seven o'clock.

By the Court:

Q. Did you get up right away?
A. Yes, sir, every morning I get up right away.
[fol. 401] Q. What time were you down to the watch?
A. Eight o'clock.
Q. What did you do after, have your breakfast first?
A. Yes, sir.
Q. You are sure it was the fireman with the black eye that called you?
A. I didn't see any black eye.
Q. Well what fireman was it that called you?
A. The fireman on that watch.
Q. Are you sure it was not Cain?
A. No, sir, it was not Cain.
Q. Well, how do you know?
A. Well, because it was another man. It was not Cain.

By Juror No. 1:

Q. What salary do the oilers, the wipers get month.
A. Well, the oilers get $72.50. The firemen get $67.50 and the wipers I believe they get $58 or $57, either one of them.
Q. Are the wipers capable of firing in place of the firemen?
A. No, they get less because——
Q. I didn't ask you that. Are they capable of firing?
A. Yes, sure; they are learning to be firemen.
Q. They are?
A. Yes.

The Court: They develop into firemen?
The Witness: Yes, sir.
[fol. 402] Juror No. 1: They are promoted from firemen to oilers?
The Witness: They are oilers and they are learning to be engineers.
Juror No. 1: Wipers are promoted to firemen?
The Witness: Yes sir. Firemen are promoted to oilers. Oilers have to go to sea at least 36 months in the engine-

room so he can get his third assistant license. When he gets 36 months time at sea.

Juror No. 1: That is all.

Mr. Cuff: That is all.

Mr. Wolfe: That is all.

MOTION TO DISMISS

I at this time, your Honor, renew my motion that I made at the end of Plaintiff's case.

The Court: Same ruling, motion denied, you may have an exception.

Mr. Wolfe: Your Honor, you reserved decision on the question of the fourth and sixth causes of action.

The Court: Yes, I have decided in your favor on that. The sixth and fourth causes of action are out.

(Recess taken at three-thirty o'clock P. M. until ten-thirty the morning of August 1st, 1928.)

[fol. 403] August 1st, 1928—10:30 a. m.

Trial resumed.

MOTION TO REOPEN CASE

Mr. Wolfe: If your Honor please, at this time I move to reopen the case in order to allow me to introduce the testimony of John Nork. I have been endeavoring for some time to locate this man. The captain, however, yesterday, while walking in the park, saw this fellow and asked him if he would come up here, and found out where he worked, and I sent one of our men from the office. I feel that his testimony is very important and at this time I ask your Honor to reopen the case to admit it.

Mr. Cuff: I object to the reopening of the case now, your Honor. We have had no opportunity of bringing anybody here to offset what this witness may have said.

The Court: Well, I want all the testimony that I can get in this case, in a case of this kind.

The motion to reopen the case is granted.

Mr. Cuff: Exception.

[fol. 404] JOHN J. NORK, called as a witness on behalf of the defendant, testifies as follows:

Direct examination.

By Mr. Wolfe:

Q. Mr. Nork, were you a member of the crew of the Steamship Alpha on February 6th and 7th, and also February 5th, 1927?

A. Yes, sir.

Q. What position did you have on that steamer?

A. Fireman.

Q. Well, what watch did you stand?

A. I stood the eight to twelve watch.

Q. Now do you recall the day of February 5th, 1927, while the vessel was lying in port in Venezuela?

A. Yes, sir, I do.

Q. What watch did you stand on February 5th?

A. A double watch.

Q. What watch?

A. The four to eight and the eight to twelve.

The Court: You are talking about the 5th, now?

The Witness: Yes, sir.

Q. Did you see the plaintiff, Cain, in this case at any time on February 5th?

A. I saw him that morning but I went ashore and I told him, I said, "Be back——"

The Court: Just answer the question. You say you stood two shifts that day from four to eight and eight to twelve. Your regular shift was eight to twelve. Is that right?

The Witness: Yes, sir.

[fol. 405] The Court: Had you stood your watch that morning from four to eight?

The Witness: No, somebody else's watch that morning.

The Court: You mean somebody else took your place on the morning of the 5th?

The Witness: No, I took somebody else's place on the morning of the 5th.

The Court: You are now talking about the afternoon of the 5th, when you stood two shifts?

The Witness: I stood my watch and Cain's watch.

The Court: You stood your watch and Cain's watch?

The Witness: Yes, he did not show up that afternoon.

The Court: His watch was from when?

The Witness: Twelve to four.

The Court: Tell us again which watches you stood that afternoon?

The Witness: I stood from four to eight and eight to twelve.

The Court: From four to eight and eight to twelve?

The Witness: Yes.

The Court: The eight to twelve was your own watch?

The Witness: Yes.

The Court: Well, whose was the four to eight?

The Witness: The four to eight fireman's.

[fol. 406] The Court: You say you stood Cain's?

The Witness: I had Cain's watch that afternoon.

The Court: Well, I don't know what you are talking about. When was Cain's watch on the afternoon of the 5th?

The Witness: Twelve to four.

The Court: Did you do that?

The Witness: I took that watch.

The Court: Then you took really in all three watches?

The Witness: Three watches. I said that Cain did not show up.

The Court: All that we asked you was how many watches you stood on February 5th.

The Witness: I stood three watches.

The Court: Why did you tell us four a minute ago?

The Witness: I tried to explain about Cain's watch.

The Court: Well, if I understand you now, you started in at twelve o'clock noon——

The Witness: Yes, sir.

The Court: —and you worked continuously until midnight, three watches, is that right?

The Witness: I started from four to eight and from eight to twelve.

The Court: You said a minute ago, a half a second ago, that you did Cain's watch from twelve to four on the afternoon of the 5th; is that right?

[fol. 407] The Witness: Yes, sir.

The Court: And then you told us a few minutes ago you took the watch from four to eight that afternoon?

The Witness: That was the following morning.

The Court: Nobody asked you about the 6th. A minute ago you told me you did three watches on the afternoon of the 5th. Will you stop and think before you talk? Can you do that?

The Witness: Yes, sir.

The Court: All right. I will start again. Begin at the midnight of the 4th-5th. Have you got that clear?

The Witness: Yes.

The Court: Twelve o'clock midnight. Did you do the watch from twelve to four in the morning?

The Witness: I did not.

The Court: Did you do the watch from four to eight in the morning?

The Witness: I did.

The Court: Was that your own watch?

The Witness: No, the four to eight fireman's watch.

The Court: It was not your own, it was not Cain's? Is that right?

The Witness: That's right.

The Court: Yours was from eight to twelve?

The Witness: Eight to twelve.

The Court: Now, then, you did the four to eight fire-[fol. 408] man's watch in the morning, is that right?

The Witness: Yes, sir.

The Court: Did Cain do the twelve to four that morning?

The Witness: No, he did not. He went ashore that morning. That was on the 5th.

The Court: Twelve to four he went ashore?

The Witness: Yes.

The Court: From midnight?

The Witness: I am talking about noon, now.

The Court: Listen to me. I started at the midnight between the 4th-5th. Do you understand that?

The Witness: Yes, sir.

The Court: And the first watch is from twelve to four—whose watch is that?

The Witness: Cain's.

The Court: Did he do that?

The Witness: Yes,

The Court: And then somebody else has a watch from four to eight and you took that watch for the other fellow?

The Witness: Yes, sir.

The Court: And then comes your watch from eight to twelve? Did you do your own watch?

The Witness: Yes, sir.

The Court: So that you worked eight hours that morning, from four to twelve?

The Witness: Yes.

The Court: Now, then, comes the twelve to four watch [fol. 409] again. Whose watch is that?

The Witness: Cain's.

The Court: Did you do that instead of Cain?

The Witness: Yes, sir.

The Court: By an arrangement with Cain?

The Witness: No, sir, no arrangement.

The Court: Cain didn't show up?

The Witness: No, sir.

The Court: Who put you on that watch?

The Witness: Mr. Woodbury, the third assistant.

The Court: What did you do from eight to twelve, did you sleep?

The Witness: I slept a half an hour and then went down a half an hour.

The Court: And then you worked again from four to twelve?

The Witness: No, from eight to twelve. From twelve to four I worked that watch.

The Court: You worked Cain's watch from twelve to four?

The Witness: He worked that watch.

The Court: Well, then came the four to eight, did you work that watch?

The Witness: No, sir.

The Court: Well, then came your own watch, eight to twelve. Did you work that?

The Witness: Yes.

[fol. 410] The Court: So that from midnight to midnight you worked sixteen hours that day, four watches?

The Witness: Yes, sir.

The Court: You are sure about that?

The Witness: Positive.

By Mr. Wolfe:

Q. Now, on the eight to twelve watch——

The Court: You mean at night?

Q. On the evening of February 5th, from eight in the evening until twelve o'clock midnight, who was down in the fire room or boiler room or engineroom, besides yourself?
A. Mr. Jackson, the second assistant.

The Court: Was he standing a watch?
The Witness: No, he was working on the boilers.

Q. Did you have occasion to talk to Mr. Jackson or see him?
A. That evening we were talking. He was telling me to keep the steam down.

The Court: No, no. Just answer the question. Just answer the question.
Mr. Cuff: May I ask that this witness be confined to rebuttal testimony?
The Court: No, I have reopened the case.
Mr. Cuff: Exception.

Q. Did you have any conversation with Mr. Jackson?
[fol. 411] A. None at all.
Q. Did he say anything to you?
A. Not at all.
Q. How close was he to you?
A. About from here to where the Judge is sitting.
Q. Did you ever see any drunken people?
A. No, sir, I did not.
Q. Did you ever see anybody that was drunk?
A. On the deck.

The Court: Any time in your life have you ever seen any drunken men?
The Witness: I did.

Q. Was Jackson drunk or sober in your opinion when you were standing the eight to twelve watch?
A. He was sober.
Q. Did you wake up Mr. Cain on the night of the 5th?
A. I called him at eleven-thirty.

Q. At eleven-thirty?
A. Yes, sir.
Q. Did you go up to his bunk?
A. Yes, and I shook him.
Q. Will you please tell the Court and jury what Cain's condition was when you went to wake him up?

Mr. Cuff: I object to that as not being proper rebuttal.
The Court: I will allow it to go in.
Mr. Cuff: Exception.

A. Well, I went to call him at eleven-thirty. I shook him and he mumbled something. I shook him again and he pushed me with his arm, so I went up to Jackson.
[fol. 412] Q. Was Cain drunk or sober at the time you tried to awaken him?
A. He was drunk.
Q. After that what did you do?
A. I went down to report to Mr. Jackson.
Q. Did you go up again to wake Mr. Cain?
A. Yes, sir, about fifteen minutes to twelve.
Q. Did you try to wake him up?
A. I tried to wake him up.
Q. What success did you have?
A. Same success as before.
Q. In your opinion he was drunk the second time?
A. Yes, sir.
Q. And then did you return to the engineroom?
A. Yes, sir, Mr. Pankor was in the engineroom at that time, the first assistant, and I told Mr. Jackson——
Q. Never mind that. After you reported to Jackson the second time did Mr. Jackson do anything?
A. He went up with me to call him.

The Court: He went up with you?
The Witness: Yes.
The Court: That is the third time you went up?
The Witness: Yes, sir.
The Court: What time was that?
The Witness: After twelve o'clock.

Q. After twelve o'clock?
A. Yes, sir.
Q. Did you see Jackson do anything to Cain?

A. He told me to get a cup of water and he threw it on him.

Q. He threw a cup of water on him?

A. Yes, sir.

Q. Did Cain get up?

A. He got up cursing.

[fol. 413] Q. What was Cain's condition at that time?

A. Very drunk.

Q. Now when you stand the port watches, Mr. Nork, do you have to be below all the time?

A. No, you do not.

Q. Did you have occasion, while you were on the eight to twelve watch, to go up on deck?

A. Yes, sir.

Q. What time was that?

A. About nine or nine-thirty, or ten.

Q. Well, while you were on deck, after coming up from below, what part of the deck were you on?

A. Amidships.

Q. Which side?

A. Port side.

Q. Well, while you were standing on the portside amidships, during one of these times that you came on deck, did you see the plaintiff here?

A. I saw him coming on the dock.

Q. Where was he?

A. On the dock.

Q. On the dock?

A. Yes, sir.

Q. Did he come on board?

A. They brought him on board. Somebody hollered, Bring him up before he falls overboard. He came out of one of those small cars like.

Q. A train you mean?

A. He was sitting on it with a few other fellows.

Q. Do you mean that this was a small narrow-gauge rail train?

A. Yes, sir. Someone says, Bring him up on board before he falls overboard. They brought him on board and he was staggering all over, and a couple of sailors brought him to his bunk in the forecastle.

Q. You didn't see the accident?

A. No, sir.

[fol. 414] Q. You went to bed?

A. I went down below and it was too hot to sleep so I went up on the fan-tail to sleep.

Q. By whom are you employed now?

A. By the Munson people.

Q. Who are they, the steamship company?

A. No, the Munson people that run the cafeterias, a restaurant.

Q. You never saw me until yesterday afternoon?

A. No, sir.

Q. And you came here today under subpoena from me, didn't you?

A. Yes, sir.

Q. The way we found you was that Captain Smith saw you in Battery Park?

A. He seen me in Battery Park. I was sitting on a bench waiting to go to work around nine-thirty o'clock. I go to work at ten o'clock, I was sitting there waiting to go to work, sitting on the bench.

The Court: Yesterday morning?

The Witness: Yes, sir. I go to work at ten o'clock; when the captain came by he recognized me and he spoke to me.

Q. What did you do then?

A. Well, he told me about the case. I told him that I remembered something about it, and he told me to go up to the court, and I came up yesterday afternoon, but I went into the wrong court. I went into the City Court, across the street.

The Court: What time did you get up here yesterday afternoon?

The Witness: About two-thirty.

[fol. 415] The Court: Who did you talk to here?

The Witness: I didn't come in here, I went to the wrong court.

The Court: When did you come in here?

The Witness: This morning.

The Court: Not yesterday?

The Witness: No.

The Court: How did you get to the lawyer's office yesterday?

The Witness: I went up to see Mr. Kennedy of Walker & Daly.
The Court: How did you come to do that?
The Witness: I met Mr. Smith.
The Court: When?
The Witness: Yesterday morning about nine-thirty.
The Court: How did you come to go to Daly?
The Witness: I could not find the court.
The Court: So you went to Daly?
The Witness: Yes, sir.
The Court: About what time?
The Witness: Three o'clock or so.
The Court: Where did you go then?
The Witness: Mr. Kennedy sent me over to Mr. Wolfe.

Q. Have you been to see the attorney for the plaintiff in this case, Mr. Cuff?
A. I did.
Q. You did?
A. Yes, sir.

The Court: When?
[fol. 416] The Witness: This month, the first part of the month, about the 18th or the 19th.
The Court: This is August.
The Witness: I mean July. I got some letters from him. I came home and I found five or six letters from Mr. Cuff.
The Court: Who did you talk to?
The Witness: One gentleman in the office, it was not Mr. Cuff.

Cross-examination.

By Mr. Cuff:

Q. I didn't quite get that.

The Court: He said he has never seen you before.

Q. Did you ever see me before?

The Court: He said he did not talk to you. He talked to one man in your office.

Q. When was that?
A. The middle part of this month, I can't recall the date.

Q. The middle part of the month?
A. Yes, around the 18th or the 16th, I should say.
Q. Where is my office?
A. 61 Chambers Street—no, 51 Chambers Street.
Q. And you were in there in the middle of the month?
A. Yes, sir.
[fol. 417] Q. And you were told to come back and see me?
A. Yes, sir.
Q. Did you ever come back?
A. No, sir, I did not.
Q. But you did come up as soon as the captain asked you, didn't you?
A. Well, I thought that you people were the defendant's lawyers. I could not tell by the letters I got.
Q. You thought we were the defendant's lawyers?
A. Yes, sir.
Q. That is why you came there?
A. Yes, sir.
Q. You found out we were for Cain so you did not come back?
A. Well, my story would not interesting to you.
Q. Now you were asked to come back to see me?
A. Yes, sir.
Q. Did you come back?
A. I did.
Q. When?
A. The same afternoon at two-thirty.
Q. Did you see me?
A. No.
Q. Did you ever see me after that?
A. I did not.
Q. You didn't come back anymore?
A. No.
Q. Now when you first came to my office you thought I represented the Alpha Steamship Company?
A. I did.
Q. And as soon as you met the captain in the park nine-thirty yesterday morning and he told you about this case,—he did, didn't he?
A. Well, he didn't start off that way. He told me about the case, though.
Q. He told you about the case, didn't he?

A. He did.

[fol. 418] Q. Told you all about it?

A. He did not.

Q. By the way, you are the fireman who brought the liquor on the ship at Venezuela?

A. I did not.

Q. Did you ever bring any on?

A. I did, occasionally, sure, we all did.

Q. You all brought liquor.

A. I brought a quart or so. I remember a quart myself.

Q. But you did no different than anybody else, did you?

A. No.

Q. As a matter of fact, when the boat goes into port you get a bottle of liquor, don't you?

A. No, we don't.

Mr. Wolfe: I object to that.

The Court: Objection overruled.

Mr. Wolfe: Exception.

Q. As a matter of fact, when a boat gets into port you get a bottle of liquor, don't you?

A. No, we don't.

Q. Where do you sleep on the boat?

A. In the same forecastle as Cain sleeps.

Q. Did you ever sleep there?

A. I did.

Q. How often?

A. Quite often.

Q. Not all the time?

A. Well, when it is hot I slept on the boat deck.

Q. You usually slept with the engineers, didn't you?

A. I did not.

Q. Weren't you a messboy?

A. I was a messboy.

Q. And you were very good friends with the captain, weren't you?

A. The same as anybody else.

Q. Just the same as anyone else on the boat?

[fol. 419] A. The same thing.

Q. Of course when you met the captain down in the park you greeted him very cordially?

A. Yes, I did.

Q. He told you this case was on, did he?
A. He did.
Q. And he told you all about it?
A. He did.

The Court: Let us find out. I don't know what this means. He told you all about it?

Q. The Judge doesn't know what that means. What did he tell you?
A. He told me the case was going on some time that afternoon, yesterday afternoon. He told me their office was on Battery Place.

The Court: What?
The Witness: Walker & Daly's office was on Battery Place. It was a purely personal conversation.

Q. I asked you if he told you all about it. What did you understand me to mean when you answered yes?
A. Well, he told me the case was going on that afternoon and he asked me if it was possible for me to be up there. I told him I would try, that I had to work from ten to two, but that I would be up there.
Q. Where did you tell him you were working?
A. The Munson Restaurant. I told him I was working in a restaurant. I did not tell him the name of the restaurant.
Q. You didn't tell him where, did you?
[fol. 420] A. No.
Q. He left you and you left him?
A. Yes, sir.
Q. And he didn't know where to locate you?
A. No, sir.
Q. So you went to the defendant's office, Walker & Daly's office, at what time yesterday?
A. About three o'clock or a little later.
Q. And there you were told some more about the case, weren't you?
A. I was not told, I just asked Mr. Kennedy where the office of Mr. Wolfe was. That's all. He gave he a slip of paper, 27 William Street.

The Court: What was that? I can't hear you.
The Witness: I say I met Mr. Kennedy in there, in Walker & Daly's office and I asked him where Wolfe's of-

fice was, and he wrote it on a slip of paper and I went there yesterday afternoon.

Q. Did you see Jackson throw water in Cain's face?

A. I did.

Q. Would you still say that when Jackson has not said anything about it?

A. I would.

Q. When you and Jackson went up to awaken Cain about twelve-fifty——

A. Twelve-thirty.

Q. You told the jury Cain was drunk when he was sleeping?

A. He was drunk, he was mumbling.

Q. Do you want to impress this jury thoroughly that he was drunk?

A. He was drunk.

Q. Were you drinking liquor with Cain?

A. No, I do not. I had an argument on the beach.

[fol. 421] Q. Were you drinking liquor with Cain?

A. No.

Q. Who did you drink your bottle of liquor with?

A. Nobody. I did my drinking ashore.

Q. Who with, ashore?

A. I was alone.

Q. Did you see any of the other men connected with the boat?

A. I did, quite a few.

Q. Were they drinking too?

A. Some of them.

Q. Tell me some of them that were drinking?

A. I don't know their names.

Q. You don't know their names?

A. No.

Q. Well, now did you see anybody drinking that night?

A. That night?

Q. Yes.

A. One of them was Cain, and a few sailors.

Q. A few sailors?

A. Yes, sir.

Q. Now counsel asked you before if you ever saw a person drunk, and you replied, "Oh, that was up on deck."

Now you misunderstood his question. What did you mean by that answer?

A. Well, I saw a few sailors drunk on deck, that was my answer.

Q. A few sailors drunk up on deck?

A. Yes.

Q. When?

A. That evening.

Q. Nobody else was drunk?

A. I don't recall it.

Q. Well, do you say now whether anybody else was drunk or not, besides the few sailors and Cain?

A. Two sailors.

Q. But you were not drunk yourself?

A. No, I was sober.

Q. You had been drunk ashore?

A. No.

Q. Well, you had been drinking ashore?

A. Yes.

[fol. 422] Q. Well, how many drinks did you have?

A. Oh, about——

Q. How many drinks did you have?

A. Well, only a few.

Q. How many is a few?

A. Well, three or four or five.

Q. Any whiskey?

A. Well, wine and whiskey.

Q. Wine and whiskey?

A. Wine and whiskey, yes, sir. I did not count them but I was perfectly sober when I came back aboard the ship.

Q. Well, you know that after a man begins taking a certain number of drinks he cannot recall how many he has had?

A. That is right.

Q. Did you keep track of the number of drinks you had?

A. No.

Q. Well, did anybody ask you about the number of drinks you had on February 6th?

A. No.

Q. Do you tell the jury that you remember the exact number of drinks?

A. I don't remember the exact number but it was three or four or five. I was sober when I came on board.

Q. You had no occasion to remember how many drinks you have had, did you?

A. No, no occasion. I did not go ashore to drink anyway.

Q. What time did you get on the ship?

A. What time did I get on the ship, what do you mean?

Q. Well, what time did you go ashore?

A. About five o'clock or so.

Q. Now you knew the ship was to sail at seven?

[fol. 423] A. The ship didn't sail at seven that night.

Q. But it was to sail at seven P. M. on February 5th, wasn't it?

A. I don't recall whether it was or not.

Q. Were you paying any attention to the affairs of the boat?

A. I always did.

Q. You had your dinner, didn't you?

A. No, I had dinner when I came back from shore.

Q. What time was that?

A. That was between seven or seven-thirty, because I helped the steward serve dinner in the salon that night.

Q. Around seven you came back?

Juror No. Four: You went ashore at five o'clock and went back at seven, and had drinks while you were ashore at that time?

The Witness: Well, the shore is about ten minutes walk. It is right at the beach where the ship docked. It is a long pier there and the ship was right at the end of the pier.

Q. What watch did you do on February 5th in the night?

A. February 5th I did the eight to twelve.

Q. What time did you go back on the boat?

A. Get back on the boat? Around six-thirty or seven. I remember helping the steward serve supper that night. I can remember that particularly because I remember we were serving some hamberger steaks and I tripped and dropped some of the hamberger steaks on the floor.

[fol. 424] Q. And you went to work at eight o'clock?

A. Yes.

Q. This same day that you worked sixteen hours?

A. On the beginning of the 4th——

Q. You told us that you worked sixteen out of the twenty-four hours? Didn't you?

A. I did.

Q. That is the same day you went out walking for two hours when you were off?

A. The afternoon at five o'clock.

Q. From five to seven you walked?

A. Yes.

Q. And in addition to that you drank?

A. A little.

Q. Now did you see a man belonging to the ship—well, I will withdraw that.

Q. You say you walked from five to seven and then came back to the ship?

A. Yes.

Q. And you had something to drink in the meantime?

A. Yes.

Q. Now were there any men belonging to the ship that you saw, on donkeys near the saloon?

A. On donkeys?

Q. Yes.

A. That is on the dock, you mean?

Q. That saloon that was near the dock?

A. I don't know what you mean.

Q. Well, isn't the saloon there, or are there not some mud huts there?

A. Yes.

Q. You saw donkeys there, didn't you?

A. Yes.

Q. Now did you see the men of the ship on some of those donkeys?

A. No, not at that time.

Q. What time was that?

A. It was the trip after that that I seen some. I don't recall seeing them on that trip at all.

[fol. 425] Q. Well, what did you see on the trip after that?

Mr. Wolfe: I object.

The Court: Objection sustained.

Q. Now you are sure you didn't see donkeys on that particular trip?

A. There was donkeys used, but I did not see anyone riding them.

Q. Didn't you see any members of the crew riding donkeys on that particular trip?

A. Well if I did I do not recall it.

Q. You were around that particular saloon between five and seven weren't you?

A. I went ashore to see some girls, that was my purpose. I did not go ashore to drink.

Q. Now, I haven't got you clear. Where you slept on that boat. Did you sleep in the same quarters with Cain?

A. The same quarters.

Q. At all times?

A. At all times. He slept one bed ahead of me, and I slept on the rear.

Q. Didn't you tell us that you slept some place else sometimes?

A. I did, on the boat deck.

Q. Well, did Cain and you sleep up there.

A. Well, he could if he wanted to. Anybody could. Most of the sailors and firemen did on hot days. They slept on the boat deck or the fan-tail deck.

Q. Isn't it a fact that you slept with or near the engineers on the ship?

A. I did not.

Q. Never did?

A. Never.

Q. What sleeping did you do on February 5th?

A. I slept a half an hour and then went down for a half [fol. 426] an hour, I slept about an hour and a half.

Q. How many hours?

A. I slept a half hour—

Q. Did you go back to your bunk right next to Cain's?

A. No, I did not. Well, after that night, I guess it was around one o'clock or so, I started to go down. It was raining. I was sleeping on the boat deck and I came down below and I saw Cain dressed in his bed.

Q. Now, Mr. Nork, when you went to the attorney's office did you talk to them about what you were going to testify here now?

A. No.

Q. Didn't mention it at all?

A. No.

Q. And nobody told you that you called Cain at exactly eleven-thirty on February 5th, eleven-thirty P. M.?

A. No, it is customary to do that.

Q. You remember that?

A. I remember it.

Q. You remember that after that on this day, February 6th, 1926, you went up at exactly eleven-fifty and called Cain again?

A. That was the following day?

Q. Did you call him at eleven-fifty on the 6th?

A. No.

Q. Did you call him at eleven-fifty on any other day?

A. No.

Q. Do you remember your testimony?

A. I do.

Q. Do you remember saying you went up at eleven-fifty P. M. on February 5th and called Cain again?

A. That was on the 5th that I called him. I called him twice, but not on the 6th.

Q. I didn't say the 6th. You are saying that.

A. Pardon me.

[fol. 427] Q. That was at exactly eleven-fifty?

A. I am not sure, it was near twelve o'clock.

Q. Which was it?

A. Well, it was eleven-fifty or eleven-forty-five, either one.

Q. You first called him at eleven-thirty and then at eleven fifty?

A. It is customary to call a man at eleven-thirty.

Q. And you are depending upon that custom to remember what you did?

A. Certainly.

Q. And you have not got any particular——

A. I am sure I called him at eleven-thirty, sometimes before that we call them.

Q. You called him before eleven-thirty?

A. Sometimes. Eleven-thirty or eleven-twenty.

Q. Mr. Nork, will you just say it once? I want to ask you a question. When you tell the jury the time——

A. Eleven-thirty.

Q. (Continuing:) —that you called Cain.

A. Eleven-thirty.

Q. Right at eleven-thirty?

A. Yes.

Q. Not at eleven-thirty?

A. No.

Q. Then you called him again at what time?

A. Eleven-forty-five or eleven-fifty.

Q. Now you have said that you and Jackson came up together and both of you went in the room and awakened Cain?

A. Mr. Jackson did not know where the forecastle was.

Q. Did you go up with Jackson?

A. I did.

Q. And you say that the second assistant engineer didn't know where the forecastle was?

A. I went down with him and called him.

Q. You had to show him where the forecastle was?

A. Yes, sir, I went down with him.

[fol. 428] Q. He was sober?

A. Sober.

Q. And you tell the jury that this second assistant engineer did not know where the forecastle was on the ship, where Cain slept?

A. This was his first trip on board.

Q. How long would it take a man to find out where the forecastle of a boat is?

A. Well, this particular forecastle was different than the others. One side was for firemen and one side for sailors.

Q. I asked you how long it would take a man to find out where the forecastle was?

A. It all depends, I don't know. I can't answer that.

Q. Well, how long did it take you to find out where the forecastle was on the boat?

A. That depends on roaming around.

Q. Well, if you walked around the boat you would find it, wouldn't you?

A. I would.

Q. Now you tell us that Jackson did not know -here it was on February 5th, and you had to lead him to it?

A. I went down with him. He asked me to go down with him.

Q. That is what you said, you had to go and show him where it was?

A. Yes, sir.
Q. That is true?
A. That is true.
Q. Now you know that Cain was hurt on that boat, don't you, on that very night?
A. I didn't know it until I went down the forecastle that night.
Q. Then you heard about it?
A. Yes.
Q. Did you sign a statement concerning it?
A. I did.
Q. When did you sign it?
A. When the ship came back to New York.
[fol. 429] Q. Did you look at that statement before you went on the witness stand?
A. Yesterday afternoon I looked at it.

The Court: Yesterday afternoon?
The Witness: Yes, sir.

Q. Well, where did you see it yesterday afternoon?
A. In Mr. Wolfe's office.
Q. Who prepared that statement on the boat?
A. I can't say who did.

The Court: Did you sign it on the boat?
The Witness: I did.
The Court: How soon after the accident?
The Witness: As soon as the ship came to New York.
The Court: What?
The Witness: As soon as the ship came to New York.

Q. After she had docked in New York?
A. Yes, sir.
Q. You are sure you signed it on the boat?
A. Yes, sir.

The Court: Who prepared it?
The Witness: I don't know.
The Court: Were the lawyers there, or just the captain, or who?
The Witness: A young man was there.
The Court: A young man who did not belong to that boat?
The Witness: Yes, sir.

[fol. 430] The Court: Did you talk to him?
The Witness: Yes, sir.

Q. Of course you remember seeing Stewart, the plaintiff's witness, on the night of February 5th, drunk, too, don't you?
A. No.
Q. You know Stewart, don't you?
A. I don't see him.

Mr. Cuff: Stand up Mr. Stewart.

Q. You remember seeing him drunk on February 5th, at night?
A. I think I remember him, yes,
Q. Drunk, wasn't he?
A. Yes, sir.
Q. Drunk as could be?
A. I don't know about that.
Q. Well, where did you see him drunk?
A. In the amidships.
Q. Now you remember having a talk with Jackson on the boat about this thing, don't you?
A. No.
Q. Jackson didn't say anything to you at all about it?
A. Not until after the accident.

The Court: Not until what?
The Witness: Not until after the accident.

Q. I mean after it happened you had a talk with Jackson, didn't you?
A. I did.
Q. And Jackson told you that Cain said that Jackson hit him with a monkey wrench in the eye, didn't he?

Mr. Wolfe: I object to that as incompetent, irrelevant [fol. 431] and immaterial.
The Court: Objection overruled.
Mr. Wolfe: Exception.

Q. I say Jackson told you that Cain said that Jackson hit him with a monkey wrentch in the eye, didn't he?
A. Yes.
Q. When did he tell you that?
A. One the next day.
Q. On the 6th of February?

A. Yes.
Q. That is the time Cain was in his bunk?
A. Yes.
Q. And you slept right next to Cain on February 6th, didn't you?
A. I did.
Q. And you slept right next to Cain on February 6th,
A. No.
Q. At any time?
A. At any time I wasn't there.
Q. Well, you were there when he came in with a statement that he had for Cain to sign?
A. No. Cain told me that himself.

The Court: Told you what himself?
The Witness: That the chief engineer came in with a statement to sign.

Q. Now this statement that you signed was made out when you signed it, wasn't it?
A. No, he asked me questions and I answered them.
Q. And he wrote down and told you what he was writing?
A. No, he didn't tell me.
Q. And you signed it?
A. Yes, sir.
The Court: Did you read it over?
[fol. 432] The Witness: Yes, sir.
The Court: Before you signed it?
The Witness: Yes, sir.
The Court: And you read it through yesterday?
The Witness: I glanced through it. I read the first sheet. I remember most of it.

Q. Now you helped the steward on February 5th when you came back on the boat?
A. I did, I served a few dishes in the salon.
Q. What was the condition of the steward?
A. He was sober.
Q. Are you sure about that?
A. I am sure.
Q. Are you positive about it?
A. I am.
Q. Is that in the stateroom?
A. No.

Q. Did anybody ask you about it?

A. No.

Q. Now this is the same day that you had worked sixteen hours and walked for two hours, and had three or four or five drinks, and you came back and worked when you should have been off duty, you worked, helping the steward?

A. I don't understand.

Q. Well, you were on watch from eight to twelve the night of the 5th?

A. I did.

Q. And you got back on the boat at seven o'clock?

A. Yes.

Q. And you helped the steward serve a few dishes?

A. I did, before I went on watch.

Q. I may be wrong. Other witnesses, I think, testified they had supper on the boat at five o'clock?

A. Yes, but this supper was late. It was at seven o'clock.

Q. Do you have supper continuously from five o'clock [fol. 433] until seven?

A. Well, from five to six to six-thirty.

Q. Well, how was it you helped the steward at seven o'clock?

A. I just felt like helping.

Q. Has anybody else besides you and Jackson ever done any work on that boat?

A. I don't understand you.

Q. Did anybody besides you and Jackson do any work on that boat?

A. Just what do you mean?

Q. You were the only ones that worked on that boat on that day?

A. No.

Q. Well, you had worked sixteen hours on watches and now you came back and helped the steward. Did he ask you to help him?

A. No, he did not ask me. I felt like it. I had done it before.

Q. It never occurs to you to take a little rest, does it?

A. Sometimes.

Q. Well, one hour and a half sleep in twenty-four hours on February 5th when the boat was in port, is that what you had?

A. Yes, sir.

Q. You didn't have to stand your regular watch?

A. I did.

Q. You didn't have to?

A. Nobody would stand it for me.

Q. Do you have your regular day watches when a boat is tied up to the dock?

A. Yes, sir.

Q. Does everybody?

A. Yes, sir, excepting the engineers.

Q. They don't have any regular watches?

A. No, not in port.

Q. But everybody else does?

A. They do.

Q. Well, who did you help serve in the mess room, who [fol. 434] did you serve?

A. I think it was the wireless operator, I cannot recall exactly.

Q. Well, how many would you say?

A. I just served two orders.

Q. Well, how many people would you say were in the mess room?

A. About five people.

Q. Now of course Cain was drunk then too, wasn't he?

A. He was not on board yet.

Q. He wasn't on board?

A. No.

Q. What kind of a vehicle is this that you saw Cain on the boat on?

A. You have seen these things that track workers use, pushing up and down. They are about four feet wide and six feet long.

Q. You mean like a hand-car on tracks?

A. Yes, sir.

Q. On railroad tracks. And he came right on the boat?

A. Yes.

Q. Right up the gang plank on a railroad track?

A. No, on the dock.

Q. Well everybody rides on that along on the dock if they can, didn't they?

A. No, that is ridiculous. That is for hauling certain kinds of work.

Q. How long is the dock?

A. About a half a mile.

Q. Don't you often ride down on one of these vehicles on the dock?

A. No, that would be ridiculous.

Q. Well, if there was nothing on it?

A. Why, certainly not.

Q. You never saw anybody else but Cain ride on it?

A. I certainly saw only a couple of sailors and Cain coming down the dock.

Q. You never saw anybody else before or since?

[fol. 435] A. No, I did not.

Q. And he was hollering and screaming, was he?

A. He was.

Q. And he came up the gang plank?

A. They helped him up the gang plank.

Q. Were the other fellows with him drunk too?

A. They were.

Q. Well, who was the mate at the gang plank?

A. I forget his name.

Q. Well, did he allow Cain to come on the boat in that condition?

A. He did.

Q. Did he bring them to the captain?

A. No, a couple of sailors brought him to the forecastle.

Q. The mate allowed this man, hollering and screaming to go right through past him, and did nothing about it?

A. Yes, sir.

Q. There was not anything for him to do about it, was there?

A. No.

Q. And men come on the boat drunk quite often?

A. Just put them to bed, that is all you do.

Q. That happens quite often?

A. It does.

Q. And nothing is done about it?

A. No.

Q. Did you ever come on the boat drunk?

A. No.

Q. Never?

A. Well, yes, once.

Q. Now you are not sure, or would you say that you are sure that this might have been somebody eles but Cain that was coming on the boat in this rebellious condition?

A. No, I can never forget that, the way he talked and his voice.

Q. That remains in your mind?

A. Yes.

Q. Of course you don't remember it simply because you [fol. 436] are a witness for the defendant and the steamship company, Walker & Daly, do you?

A. No.

Q. That has nothing whatever to do with it?

A. No.

Q. Did you talk with Jackson since the first conversation you had?

A. No. The first I met him was right here in this court room.

Q. Did you talk with him?

A. No, just a greeting. He was talking to Mr. Pankor. I tried to talk to him but the captain, Captain Smith called me in here.

Q. Did you talk to Pankor?

A. I had a conversation with him.

Q. When?

A. This morning.

Q. That conversation was a little bit longer than greetings, wasn't it?

A. We were talking about different matters, we were talking about Deisel engines.

Q. Didn't you mention anything about this case?

A. Well, he asked me what I knew about it, and I says not much. Just as much as you do. I came here to tell the truth.

Q. You told that to Pankor?

A. Yes, he says to me, what do you know about the case, he says. I says just as much as you do.

Q. Just as much as Pankor knows, is that right?

A. No, all that I know is what I can testify to.

Q. Well you told Pankor that you knew just as much as he knew.

A. Well, that was just the same as a greeting. The same as I was to meet you on the street. I would say the same as you do.

[fol. 437] Q. Well, how much do you know about this case?

Mr. Wolfe: Objected to.
The Court: Objection sustained.
Mr. Cuff: That is all.

Redirect examination.

By Mr. Wolfe:

Q. Is it customary for the engineering officers on board a vessel to come down to the crew's quarters?
A. No.
Q. Except when the captain makes an inspection?
A. That is all.
Q. You signed a statement aboard the ship. I show you what purports to be a statement, and ask you if that is the statement which you signed?
A. (Witness examining paper) That is the paper.
Q. And I showed you this paper in my office, didn't I?
A. Yes.
Q. And you read it over, didn't you?
A. Yes.
Q. You were with me altogether about ten minutes?
A. Yes.
Q. By the way, did you have any conversation with Cain about this accident after that first morning?
A. Well, I met him one time. He says that is a fine thing to do.

Mr. Cuff: I object to that as not proper re-direct examination.
The Court: Objection overruled.
Mr. Cuff: Exception.

[fol. 438] A. That is a fine thing to do, he says to me when I met him. I says what? He says that is a fine thing to do, to make a statement like that, and I said, What do you mean? And I walked away.

The Court: Where did you meet him?
The Witness: I met him again in the Seaman's Home, that was May 14th, I think.
The Court: This year or last year?

The Witness: This year. He did not say a word to me. He was running an elevator in there.

Mr. Wolfe: That is all.

The Court: Just a minute. You said that Jackson went down with you to wake him up?

The Witness: Yes, sir.

The Court: You said he cursed after Jackson threw water on him, you said that he cursed?

The Witness: He jumped up and started cursing.

The Court: What did Jackson do when he cursed?

The Witness: He just walked away.

Juror No. 1: I would like to ask where the witness got the hour and a half sleep.

The Witness: On the hatches.

Juror No. 1: When, what time?

The Witness: In the afternoon.

Juror No. 1: What time?

The Witness: Around nine o'clock.

[fol. 439] Juror No. 1: That night?

The Witness: No, that morning. Mr. Woodbury, the third assistant, says to me, Go on the couch and get some sleep. He waked me up a half an hour later, and I would go down and come back again.

Juror No. 1: Wasn't that when you were supposed to be working?

The Witness: Yes. It was a port watch though and you could be on deck now and then.

Juror No. 1: Didn't you sleep from four to eight?

The Witness: No, I did not.

Juror No. 1: What did you do from four to eight?

The Witness: I stood that watch.

Juror No. 1: I mean in the middle of the night.

The Witness: I did, sir.

By the Court:

Q. Didn't you sleep then?

A. Yes.

Q. And you stood watch from midnight until four o'clock in the morning?

A. No, in the afternoon.

Q. Well, let us get at midnight again on the 4th.

A. I didn't stand that watch.

Q. From four to eight on the 5th?

A. I slept until four o'clock.

Q. You stood the watch when?

A. From four to eight and from eight to twelve.

Q. And you stood the watch eight hours straight from [fol. 440] four to twelve, is that right?

A. Yes, sir.

Q. Did you sleep during that eight hour watch?

A. I did that morning, about nine o'clock or so. That is when I first went up.

Q. And then you had four hours sleep to begin with, beginning at midnight?

A. Yes.

Q. How about the night before?

A. I had the regular watch.

Q. From when?

A. From eight to twelve.

Q. And then you went down to sleep from twelve to four?

A. Yes, sir.

Q. And then you went on watch?

A. Yes, sir. The reason I had that watch, one of the firemen had a black eye. The four to eight watch is the regular watch.

Q. Well, what did you do at twelve o'clock noon?

A. On the 5th?

Q. Yes.

A. I stood that watch.

Q. You said you stood the watch from four in the morning until noon, and then from twelve to four what did you do?

A. I stood that watch from twelve to four on the 5th.

Q. And then you had twelve hours straight running watches? Is that right?

A. Yes, sir. I did that quite a few times.

Q. Well, that day you began on four o'clock in the morning of the 5th and you stood three straight watches in succession?

A. Yes, sir.

Q. And that brought you until four o'clock in the afternoon?

A. Yes, sir.

Q. Well, what did you do in the afternoon?

A. Well, I know I went and ate a little bit and then I went ashore after I got washed up, I went ashore to see [fol. 441] some girls. That was my reason for going ashore.

Q. Well, when did you come back?

A. Around six-thirty.

Q. And then you stood the watch from eight to twelve?

A. Eight to twelve.

Recross-examination.

By Mr. Cuff:

Q. Do you realize you just added an hour and a half to the time when you came back. You told us before that you came back at five o'clock; now you say six-thirty.

A. No, I says I went ashore at five o'clock. I went off watch at four o'clock and I cleaned up and went ashore to see some girls.

Q. I hand you this statement that you are supposed to have made and ask you where that was made?

The Court: You have no business with that statement unless you will introduce it, Mr. Cuff. You can ask him about it, but you can't do that unless you are going to offer it.

Mr. Cuff: I wanted to identify it.

The Court: Well, if you are going to identify it you cannot say I hand you this statement.

Q. The statement that you made out, or the statement that was made out for you, and signed by you, will you tell us just where that was done?

[fol. 442] A. On board the ship. I think it was in Bayonne, I am not sure.

Q. What part of the ship?

A. Amidships somewhere, not in the forecastle.

Q. Did you read over that statement before you went on the witness stand this morning?

A. I did. I read it over, the first sheet.

Q. Does it say anything about Cain coming on the boat?

Mr. Wolfe: I object.

The Court: Objection sustained.

Juror No. 10: I understand that he had four or five drinks in him on shore in Venezuela. Is that right?

The Witness: I did.

Juror No. 10: What was the size of the drinks?

The Witness: Very small drinks, about this size (indicating).

Juror No. 10: Did they serve drinks like that in glasses or in washtubs?

By Mr. Cuff:

Q. Do you know who gave the fireman the black eye that he had?

A. I don't know.

Juror No. 1: When you called Cain at eleven-thirty at night what time is he supposed to go to work?

The Witness: Ten minutes to twelve.

Juror No. 1: I thought the shift was twelve o'clock.

The Witness: Well, we call them beforehand, and the [fol. 443] man comes down at ten minutes to twelve.

Juror No. 1: They are supposed to be there at ten minutes to twelve?

The Witness: Yes, sir.

By Mr. Cuff:

Q. Do you say that in spite of the fact that Jackson said he was due down there at twelve o'clock?

Mr. Wolfe: I object to the form of the question.

The Court: Objection sustained.

Q. Would you make the same answer if you were told that the second assistant engineer, Jackson, said that Cain was due down there at twelve o'clock?

A. I didn't make any such statement.

Q. I asked you—you said he was due at ten minutes to twelve?

A. It is customary to be down there then.

Q. Just a minute. Jackson said he was due at twelve o'clock. Do you still say he was due at ten minutes to twelve?

A. No, I do not.

Q. You change it?

A. No, I don't, it is customary to be down at ten minutes to twelve.

Mr. Cuff: That is all.
Mr. Wolfe: That's all.

[fol. 444] ROBERT CAIN, recalled in his own behalf, testified as follows:

By Mr. Cuff:

Q. Mr. Cain, do you know the last witness?
A. Yes, I know him well.
Q. He says he slept alongside of you in the bunk?
A. He slept ahead of me when he was there.
Q. Was he always in his berth?
A. No, sir.
Q. Where did he sleep most of the time?
A. He slept out. If the captain told you everything, I was——

The Court: I don't understand that, he asked you where he was sleeping.
The Witness: In the forecastle, forward.

Q. What were you saying about the captain, Cain? Has that any relation to the question?
A. I was in bandages and the forecastle got full of water——
Q. What did you say about bailing out?
A. I bailed out the forecastle when it was full of water.

The Court: You bailed it out?
The Witness: Yes, sir, in bandages.

Q. When?
A. The second day after we left Venezuela. The ship was going along and we shipped water through the ventilator in the forecastle.
[fol. 445] Q. Now, when you say this last witness slept forward on the boat, what do you mean by that?
A. That is our quarters. Our quarters is in the forecastle, and we also have to keep it clean.
Q. Firemen and seamen are supposed to sleep in the forecastle?

A. Yes, sir.

Q. Nothing but officers are supposed to sleep where?

A. In amidships or the after end.

Q. In the amidships or the after end?

A. Yes, sir.

Q. When you say that Nork slept aft, you mean that he slept down in the officers' quarters?

A. On the after end, on the poop.

Q. Now, Cain, this man has said that you came on the boat in some manner, in an excursion boat or something like that, or a vehicle or something.

A. I heard him.

Q. Did you come on the boat on your feet?

A. Yes, sir. I spoke to him in the messroom while I was eating supper. I said I am tired, I am going to turn in. You are right, you have been out eight hours, he said. I said, yes.

Q. You have had a list of the members of this crew in your pocket for a year, haven't you?

A. Yes, sir.

Q. And you have tried to locate them all, haven't you?

A. Yes, sir.

Q. And you have sent letters to them all?

A. Yes.

Q. And we sent letters to this man, too, didn't we?

A. I think we sent one to him when he was on the Alpha.

Q. And you wrote to him yourself?

A. Yes.

Q. And you didn't happen to meet him in a park sitting [fol. 446] on a bench, did you?

A. No.

Q. Cain, this last witness says that he came up to your bunk with Jackson and that Jackson threw some water in your face. Did that happen?

A. No, sir.

Q. He said when he came to your room——

A. He called me and I said all right and I went and fell back into a sleep again, and he went away. I am telling the truth, and he knows that I am telling the truth. I was a bit late on watch, because I overslept myself.

Q. You admit that?

A. Yes, sir.

Q. Is he the fellow that called you when you overslept?
A. He was the man that called me.

Mr. Cuff: That's all.
Mr. Wolfe: That's all.

(Summation by Mr. Wolfe for the defendant.)
(Summation by Mr. Cuff for the plaintiff.)

CHARGE TO JURY

JULIAN W. MACK, J.:

Gentlemen of the jury, we have been at this thing for a pretty long time, but this is now coming to the end, and you are going to have the last say and I the second to the last, so it is my turn now.

[fol. 447] It is my duty to tell you what the law is that is going to govern in this case. It is your duty to decide what the facts are and apply the law as I give it to you, to the facts, whatever you find them to be. I have the right to help in reaching a conclusion as to the facts. I have a right to give you my view as to what those facts are, and in the course of what I say I may express some views. While you are under oath, bound to do as I say as regards the law, and accept that as conclusive, you are not in the same way bound to take what I might say are any of the facts. My function, as far as the facts are concerned, is merely advisory, if I wish to advise you, but you have the right to reject that if you think that your views of the facts are sounder. You have the right to consider it and weigh it, but you are in no wise bound to take it as you are bound to take the law from me. That describes in a fair way the different functions of the Court and the jury in a case of this kind.

There has been some tall lying in this case, in my judgment. When two people differ about a thing, one or the other, or both of them may be mistaken, and one or the other, or both may be lying. It is difficult for me to see how some of the disputes could be explained on any theory [fol. 448] of one or the other or both being mistaken. It is easy for me to see how some of the disputes could be

explained by one or the other or perhaps both, in some instances, lying.

Now, who is lying, if anybody, is perhaps the most vital question for you to decide. Was he hit, or did he stumble or fall? If he was hit, did Pankor hit him or did Jackson hit him, or did both of them hit him? If one or the other hit him, did they hit him on the eye or just above the eye, or up on the head? Was his eye bandaged? Wasn't it bandaged? Was Jackson drunk? Was Pankor drunk? Was Cain drunk? Was one or the other or all of them sober?

Now, of course, if, as is charged, Jackson did not hit him, that ends it. Cain's case depends upon your belief that Jackson hit him. That is the first step. If he got hurt because he was drunk and stumbled, whether it was once or eight times is immaterial. On the other hand, if Jackson did hit him, why did Jackson hit him? Jackson was his superior officer. Did he have anything against him? There isn't any evidence that he did, and if he hit him, why did he hit him? This is not a suit against Jackson, it is a suit against the ship owners and operators. Jackson is their employee. He is the second engineer, the man in [fol. 449] authority above Cain. If there was a private brawl between the two, and Jackson, just as a matter of private brawl, gave him a licking or hit him over the head with a wrench, or anything of that kind, then subject to that which I am going to speak to you about as to the second count, the employers would not be liable. If, on the other hand, Jackson hit him, that is the important thing, and everything depends on that. If Jackson hit him, as he said, and if Jackson hit him because he was a superior officer and because he was mad at him for being late and he was punishing him, then even though he did not have the right as a second officer to hit him with a monkey wrench, still he would be acting as a second officer in the line of his duty, even though he went beyond what he ought to have done, and the ship owners and operators would be liable for the excessive use of his actual authority. Of course, as I said before, that depends on whether or not he hit him.

Now, the first count is based upon the charge that Jackson did hit him and did hit him in the line of his duty. I

mean that while Jackson, as superior officer, beyond any rights to do what he did, if he did hit him, still, the charge is [fol. 450] he was doing it as a second officer and not merelyl as Jackson.

That is the basis of the first count and I have indicated the questions, at least some of them, that you will have to determine in reaching a conclusion as to whether or not Cain has sustained the charge that he makes in this first count.

Now, the next count is somewhat different. The next question is irrespective of whether Jackson was actually hitting him, if he did hit him, as a second engineer, or whether it was just entirely outside of his duty, and that count is based on the alleged negligence and wrongdoing of the captain. In substance, the charge is that Jackson was drunk, so drunk that he should not have been permitted by the captain to be exercising any authority whatever, and that the captain knew that he was so drunk that he ought not to be permitted to exercise any authority whatever, because I cannot see on any of the facts here anything that would sustain any charge that before that time Jackson had so misbehaved himself that the captain should know, and not permit him to act there in authority over other men. The only possibility of the second charge is that he was so drunk, to the knowledge of the captain, that the captain ought to not have permitted him to be in the position that he was at the time, and that that is a wrong to all [fol. 451] people on board who would be under him, including Cain, and that the captain, acting for the vessel's owner, committed that wrong, therefore, if a damage resulted from that wrong to Cain, the owners would be liable. Theoretically, if that is proved, that is true, but here again, if Jackson did not hit him there is no case. If Jackson did hit him, there is the first step in the case. If Jackson was so drunk that he ought not to have been permitted to act as an officer at that time, then there is the second step of the case, and if the captain knew he was drunk, so drunk that he ought not to have been allowed to act as an officer, then there is the last step, and only if you find all of them, can you find liability under the second count.

The first count is irrespective of whether Jackson was drunk or sober, or whether the captain knew his condition

or not. The first count depends only upon the allegation, and that must be sustained, first that Jackson did hit him, and second that he hit him not as a matter of a private brawl, but in the exercise of his authority over him as a superior officer, chastising him because he had gone up there late. The third count I am taking away from you—in fact, all the other counts I am taking away from you. Two of them I have dismissed before. The other two I [fol. 452] have dismissed as not constituting any additional causes of action.

You have the first two counts to consider. Now, how are you going about it to decide? How are you going to determine what the facts are? You must decide it on what you have heard and seen right here in this court room. You can not do any guessing outside of that. You must take these witnesses as each appears before you. You have heard something about another trial. Questions have been read from another trial. What was there said has nothing to do with this case, except in this respect: If a man said something here and something different there, unless he has explained it to you, to your satisfaction, he has contradicted himself. That is one element for you to decide in determining how much weight you are going to give the testimony. But the facts must be the facts as they appear in this trial. The evidence that you are to consider must be the evidence given in this trial.

Now, suppose you are in doubt after you have come to consider the whole thing? How are you going to decide? Well, we have a little law to give you on that. Perhaps it is arbitrary, but there it is. Somebody has got to overcome your doubt. The law says that the man who sues, [fol. 453] the man who sues—A says B hit him. A must prove it to you. And so when you come to the next step—A says that B hit me and damaged me. He must prove to you that he was damaged, and he must prove the injuries and how much that damage is worth to him. What do I mean by he must prove it to you? Both sides have brought evidence here. You must weigh all this evidence, giving each witness such weight as you think he is entitled to, and then you throw it all into a mental scale. All the things that weigh in favor of the plaintiff, and all the things that weigh against the plaintiff, and you see how that scale appears.

If that scale tips in favor of the plaintiff on each point that he must prove, he wins, and if the scale tips in favor of the defendant, the defendant wins, and if the scale just balances evenly in your mind, the defendant also wins. That is his advantage in this case. In other words, the plaintiff's side must tip down the scale in his favor.

Many of you have perhaps sat as jurors in a criminal case. In criminal cases where the Government has to prove that a man has committed a crime, the law differs in those cases. Using the same figure of speech, it says that the scale must tip a way down in favor of the Government in order that the Government shall convict a man of a crime, [fol. 454] or putting it in the language of the law, the Government must prove a man guilty beyond all reasonable doubt before he can be convicted, but in civil cases where A is suing B for damages, the scale does not have to tip a way down. The scale must tip in favor of the plaintiff no matter how little it tips. In other words, to put it in the form of words, the plaintiff must sustain his case by the weight of the evidence, not beyond all reasonable doubt, but just by weight of the evidence so that in this mental balance, after considering all the testimony, if the scale tips in favor of the plaintiff on the points that he has got to prove, then he wins; if it does not, he loses.

Now I said something about the weight you have got to give to what each one says. I have said also somebody here in my judgment is doing some tall lying. How are you going to determine who is the liar and who is not? How are you going to determine who has got a good memory and who has not? How are you going to determine who told the truth and, if he is not a liar, has at least forgotten or is mistaken? Those are the things that you as men of the world must determine as you determine any other fact. Of course, if a half a dozen fellows come and say that they saw something happen on the street, and another man comes and says that it did not happen, that one man may [fol. 455] be right, and the other half a dozen may be wrong, but you will give weight there to the fact that there are six there. So in the trial of a lawsuit. The weight does not depend upon the number, but the number testifying one way against the number testifying another way, is a fact to be taken into consideration, and the minority

may still be right. Weight does not mean the number, that is only one element that goes to make up the weight to be given testimony.

Take it another way, gentlemen. The interest that a man has in telling the truth or in lying. There is no question but that Cain is interested in this case. There is no question but that he wants to win, but the fact that he has an interest is a fact to be borne in mind in testing how much weight you are going to give this testimony, but that does not mean because a man has an interest that he is going to lie. It means only that you have a right to consider that in determining his credibility. He is not the only one who is interested in the case. He is the only one who has a money interest, but there are other interests. Jackson, for instance, said that he came here, among other reasons, to save his reputation. Gentlemen, a reputation is a very important interest in life.

Jackson has an interest in his reputation if he wants to keep on in his business. Because he is not without interest [fol. 456] does not mean that he lied, it is for you to say whether the interest carried him away, whether he had a deficient memory or whether he actually lied.

The captain has an interest, too, in his reputation. He was boss of this ship. These things went on there. It is not nice to have things like this happen. The fact is that the captain improperly performed his duty. He says he did not want to give Cain a black eye on the books so he did not put down anything. He should put it down. It is true that Cain has not been hurt by not putting it down, because the captain says that Cain told him so and so, just the things that Cain says here, but he says that Cain told him something else afterwards. Cain denies it. Is it Cain who is telling the truth? It is between the captain and Cain on that point. Now taking up each man individually, you have a right to consider how he impressed you when he came on the witness stand here. The way that he talked. The way that he looked. Whether he hesitated and hemmed and hawed, or did not. Whether he seemed to you to be perfectly frank and honest, or seemed to be trying to find out what would be the best thing to say, the best evidence to give. Those are all human considerations that enter into the determination by you as jurymen. The question whether that [fol. 457] man told the truth or did not, whether he was mis-

taken or not, whether he was frank or was not frank, whether his story is correct or is not correct. Of course you can take into consideration the human probability.

There certainly was whiskey on board, whether a lot of these fellows had it in their stomachs and it and it had gone to their brains or not, that is for you to say. Whether they loaded up in those saloons or whether they did not, and who did, how many of them did, whether it affected their conduct, whether their memory was affected or not, who saw straight that night, who didn't, who acted straight, and who did not, they are all human problems. That is why we have jurors, in order that the average man can deal with problems of that kind to reach a conclusion, without prejudice to anybody. It doesn't make any difference that Cain is simply a fireman, a long way from home, earning at the best $62.50 a month and board, and the defendant here ship owners and operators of ships. Your mind goes perhaps to the thought that they have got more money than Cain here. That is utterly immaterial and the case is not to be decided because there is a firm of ship owners on one side and a man like Cain on the other. It is to be decided just exactly the same as though it was J. P. Morgan and Vanderbuilt fighting each other. No sympathy for Cain.

[fol. 458] It is perfectly human, however, for all of us to have some sympathy for him. There is no question but that he has a cataract over his eye. No question but that he has had a lot of pain and suffering, no question but that he has lost money, but neither sympathy for him or prejudice against corporations, if any of you here have any prejudice against corporations, or ship operators, should enter your mind in considering this case. It is just to be dealt with by you as though it were one of you against another one; to be determined on the facts and the testimony you heard and not on anything else.

Now only this morning both sides have summed up to you the situation and what has been testified to by witnesses on either side. I am not going to express to you an opinion even though I have one as to where the truth lies here, as to whether this man got the injury by being hit by Jackson, or falling down. That is for you to say. It is only fair to Cain to call your attention to the fact that both on the captain's testimony and his own, he told the captain right away some story as to what happened. The captain says that he told

him that he had been hit by the first engineer and then by the second engineer. Whether he meant by that that he told him that the first engineer and afterwards the second hit him, or whether he meant by that that he told him first [fol. 459] that he had been hit by the first engineer, and then again he said by the second engineer, that I do not know. It is for you to say. He says, on the other hand, that he told the captain he was hit by the first engineer and also hit by the second. There you have it. But the captain says that he was drunk, and on the next day he told him he was not hit, but that he fell down. He says that he did not tell the captain anything of the kind. He says he was not drunk.

Of course, the captain might have confronted him with the two men right away. He did not do it, but if the captain thought he was drunk at the time, if the captain thought he was not only injured but drunk, and too drunk to know exactly what he was doing, then the captain may have been justified in not confronting him like that. And if, as the captain testified, he told him the next day that it was caused by this falling down, why of course the captain would be justified then in not investigating further his first statement.

Well, now, I have told you what it is that the plaintiff has got to prove in order to win on either the first count or the second count, or both, and I have told you where the burden of the evidence is, who has to sustain the weight of the evidence, and I have given you some rules for determining where the weight of the evidence is, and I have told you that [fol. 460] you must find first of all, before you can find the defendant guilty, that is that Jackson did hit, as he said he did, with a monkey wrench or some other instrument, and I told you the other things you must find under the first and second count. All that I have told you has to do with the question as to whether the defendant is liable or not liable, and that is the first question that you must decide. Is the first question that you must decide. Is the defendant liable for this, or isn't he? If the defendant is not liable, that ends it. If the defendant is liable, then and then only do you have to determine how much he is liable for. You have not any right to compromise. Jurors have often disobeyed this rule, but you have no right to. Jurors often say, Well, I guess he is not liable, but then we are in disagreement and dispute, we won't soak it to the defendant, but we will give the plain-

tiff something. It won't hurt the defendant in any way, so we will compromise on the whole thing. We will say, Well, you are liable even though we think you are not. We will let you off easy.

Gentlemen, that is contrary to your oath. You must first decide whether the defendant is liable. If you decide that, then you must determine the extent of the liability. If the defendant is liable, plaintiff is entitled to all that he is justly [fol. 461] entitled to under the rules of law. If the defendant is not liable, then the plaintiff is not entitled to anything under the rules of law. If the defendant is not liable, then the plaintiff is not entitled to a penny.

Now then, assuming, and I must assume in order to go ahead, assuming that you found the defendant liable, then it is for you to say what the damage is, and you must be guided by the evidence. The plaintiff must prove it by the weight of the evidence. The first question that you will have to decide is this: If Jackson did hit him and if the defendant is liable because of the way Jackson hit him, what happened? Did this cataract come from that hit, or didn't it? You have heard the dispute as to whether he was hit on the eye or on the head. You have heard the dispute of the doctors as to whether a hit on the head could cause it, or could not, and then you have heard the dispute of the doctors as to what the condition really is. Was it caused by the hit on the head, or wasn't it? Was it what they call a traumatic or non-traumatic? When I say non-traumatic, I mean that it was not caused by a blow. Or was it a cataract formed from some tuberculosis condition, a tuberculosis cataract, or was it caused by some disease or other, forming in the course of time, or was it not? Of course if it was, then that is out of this case. It is only [fol. 462] if Jackson delivered the blow and that blow caused the cataract to come that the defendant would be liable for the cataract. Of course, they would be liable for the loss of wages he was going to earn. They would be liable for the wages he would earn in the future, what you could determine a reasonable and probable future loss, but not for the cataract, unless the cataract was caused by the blow. If it was caused by the blow, then they would be liable in addition the other things, pain and suffering and for whatever additional money loss he has suffered or will

suffer in the future. So if you find there was a loss of time by reason of his having a cataract, the amount of the loss is for you to determine. Now on that question, you have a question of dispute to decide. Is he any less fitted to be a fireman by reason of his present condition, assuming that the defendant caused that condition or not. What sort of a job can he do now? How much less will he earn during his reasonable expectancy of life, than he had been earning, if any? Of course, if he can work as a fireman just as well as before, then there will not be anything in that. If he cannot, then there will. It is for you to say what the amount will be in that event. It is for you to say how much will be a fair and reasonable compensation to him for [fol. 463] the injury suffered from the blow, if he got a blow from Jackson. He has not any doctors' bills, because the Marine Hospital attended to that. I think that is the only element in the case.

Now, gentlemen, I think I have given you what I intended to give you, but it may be that in talking freely to you here that I overlooked some things that the parties want me to tell you. I should say this: If you find liability, whether you find that there is a liability under the first count, that is, because Jackson hit him as his superior officer, because he was not doing his duty, or whether you find that Jackson hit because the captain knowing Jackson was drunk, knowing that he was a drunkard, a drunken brute, ought not to have let him be in a position of authority at that time, I say regardless of which it is, damages will be the same; and so if you find damages, whatever you find to be damages, you will find your verdict for such and such an amount. If you find for the plaintiff at all, for the purposes of safety, I would like to know on what count you find the defendant liable, whether you find the defendant liable, under the first count or the second count, or under both counts. Whether you find for him under the first or second or both, however, it will be just a single verdict for whatever the damages are; and of course if you [fol. 464] find that the defendant is not liable, then there will also be a single verdict, that the defendant is not liable.

Mr. Wolfe: If your Honor please, I ask the Court to charge the jury that if the jury believes that any witness has testified falsely as to a material fact, the jury is entitled to disregard the testimony of such witness.

The Court: I should have said that. When I was speaking to you about the weight to be given to the testimony of any witness, I should have added that. It is really a rule and a guide, from your experience, and not as an absolute rule. If you believe that in a material fact in the case anybody has lied to you, you have the right, but not the duty, the right to say that fellow is a liar, and I won't believe anything he said at all, but you do not have to. You can say that fellow lied on this point, but still on other evidence I think he told the truth on the other point. That is simply a guide for your determination as human beings. A good many people think that if a fellow lies on one material point that he is to be considered a liar clean through. Of course if he has lied on one material point and another material point comes up and he says one thing and B says another thing, you would rather believe B than A, who has lied to you on some other disputed point.

[fol. 465] Mr. Wolfe: I ask your Honor to charge that the master of the vessel is the supreme officer and that he has sole and exclusive authority on board of his vessel, and no other officer has authority to administer discipline, except in the absence or incapacity of the master, by express delegation from the master.

The Court: Well, I will give it this way. The master of course is the boss. Everybody is under him. Now each officer in turn does have authority, unless he has done something that takes it away from him, over the fellows under him. There is nothing in this case to show that any rights were taken from Jackson, any rights that he would ordinarily have as being second assistant engineer over the fireman who were under him.

Mr. Wolfe: I respectfully except.

I ask your Honor to charge the jury that the jury must find a verdict in favor of the defendant unless they find that the assualt was committed with the knowledge and consent of the master.

The Court: I say on the second count that if the master knew that Jackson was so drunk at that time as to be unfitted to do his duty, if he knew that, and he let him go and act, and if then, although the master knew nothing about [fol. 466] it, Jackson hit this fellow on the head, the ship would be responsible, the owners and ship operators would be responsible because in that case it was due not merely to Jackson's wrong, but to the master's wrong in permitting the man whom he knew to be in that condition, to be in authority.

There are a lot of if's in that, gentlemen, and it is up to you to find them.

Mr. Wolfe: Exception.

I ask the Court to charge the jury that there is no evidence from which the jury can find that the defendant failed to use reasonable and due care in the selection of the second engineer, Jackson.

The Court: That is not in the case.

Mr. Wolfe: I ask the Court to charge the jury that the defendants are not liable for an act or acts of an employee authorized to direct or supervise other employees where such act is outside the scope of the authority controlling.

The Court: I have explained that already to the jury.

Mr. Wolfe: Exception.

I ask the Court to charge the jury that the agency of the master for the owners, includes all those acts which are fairly embraced within the scope of his appointment and which would be in the line of his duty, but when he injures his men by assault, such assault is one of the risks assumed on entering the employment of the vessel, and if the jury [fol. 467] finds an assault was committed by the second assistant engineer, such assault was without the scope of his employment, and the owners will not be presumed to have assented thereto.

The Court: I refuse so to charge.

Mr. Wolfe: Exception.

I ask the Court to charge the jury that the second assistant engineer was not the defendant's representative for the purpose of providing the plaintiff with good treatment and care.

The Court: Yes, but that has nothing to do with the case.

Mr. Wolfe: Under the second cause of action.

The Court: Go ahead.

Mr. Wolfe: I ask the court to charge the jury that if the jury finds that an assault was committed when either the plaintiff or the second assistant engineer was drunk, they must find a verdict for the defendant.

The Court: No.

Mr. Wolfe: Exception.

I ask the Court to charge the jury that the defendants are not liable for the injuries caused by one fellow servant to another fellow servant due to an assault, unless the assault was ratified by the master.

The Court: No.

Mr. Wolfe: Exception.

I ask the Court to charge the jury that the plaintiff was a fellow servant of Jackson and takes the risk of injury [fol. 468] caused by the negligence or assault of Jackson, his fellow servant.

The Court: That has not anything to do with the case.

Mr. Wolfe: Exception.

I ask the Court to charge the jury that if the jury find that the master wilfully neglected to prevent an assault on this plaintiff, in violation of his duty to the owners of the vessel, the jury must bring in a verdict in favor of the defendant.

The Court: I will not so charge because it has no application to the case.

Mr. Wolfe: Exception.

I understood your Honor to charge that if they found that there was an assault and that the defendant was liable, that then they should find that the cataract, if they find it to be a non-traumatic cataract——

The Court: Maybe I did not make myself quite clear on that point. If you find, gentlemen, that Jackson did hit him in the way described under the circumstances, so that you find a liability under the first cause of action, or the second count, or both counts, then in considering the question of damages, and the amount of them, you have a right to take into consideration whatever he has lost in money, or in all probability will lose in money, as a result of the

injury. If one of the injuries sustained is this cataract, in [fol. 469] other words if the cataract was caused by that, then whatever loss in wages is due to his having a cataract is one of the elements.

If, however, you find that the cataract was not caused by the hitting, if there was a hitting, then you cannot take into consideration any loss of time due to the cataract. You can only take into consideration any loss of wages that resulted because of the injury. There is no evidence that the plaintiff lost any wages or any time by an injury other than the cataract itself. I think there was no loss of time other than that caused by the cataract, but there was, gentlemen, pain and suffering, other than that caused by the cataract, if that pain and suffering was due to the blow. In other words, as he testified, after three or four days he went to work again on the ship, and he got his pay during the voyage anyway; he was kept out of work after that because of the cataract, not because of any remnants of any other injury.

Mr. Wolfe: I ask the Court to charge the jury that the payment of $120 which the plaintiff testified he received, has no bearing on this case.

The Court: None at all. That fact has nothing to do with the question of liability.

Mr. Cuff: That among the situations which the jury may consider in determining who is telling the truth is not only [fol. 470] the fact that Cain made the complaint to the captain that he had been assaulted, but also he was admittedly fleeing along the deck from Jackson. That is the testimony from Jackson himself as well as Cain.

The Court: That would not prove one way or another whether Jackson was running after him to help him or not.

Mr. Cuff: I ask that that situation be considered in determining that point.

The Court: That is for the jury.

Mr. Cuff: I ask the Court to charge the jury that Stewart, the plaintiff's witness, was an entirely disinterested witness.

The Court: Entirely disinterested; and so were a lot of other people, just as disinterested as Stewart. You are asking me to comment on the fact. You are picking out the fact for me to comment on.

Mr. Cuff: The rule that your Honor stated about the witness testifying falsely to a material fact, the plaintiff asks your Honor to charge that whether or not Jackson was trying to overtake the plaintiff was a material fact and if Jackson testified falsely as to that fact.

The Court: No, I won't begin to pick out one of the fifty material facts in the case.

Mr. Cuff: I ask the Court to charge the jury that if the [fol. 471] jury finds that the defendant's second engineer, Jackson, struck the plaintiff with a wrench, and finds the defendant liable under the law, as your Honor has charged it on either the first or the second situation, that if they also find that Cain was drunk that situation would be immaterial in the event that a verdict should be for the plaintiff.

The Court: No, that he was drunk, if he was drunk, would not justify hitting him over the head with a monkey wrench, if he was hit over the head with a wrench.

Mr. Wolfe: I except to that.

I ask your Honor to charge the jury that if they find that both Cain and Jackson were drunk, then there is no liability at all.

The Court: No, no. I will not charge that.

Mr. Wolfe: Exception.

The Court: The jury will retire.

Juror No. 3: If your Honor please, there has been no possibility here for the jury to examine any of these alleged scars at first hand that the plaintiff carries, and I should like your Honor's permission to be able to examine some of these alleged scars.

The Court: There has not been any testimony about any scars.

Mr. Cuff: The plaintiff consents to opening the case to allow the jury to examine the scars.

[fol. 472] The Court: The plaintiff here was an exhibit, because he was a witness, and you have the right to look at him. You have the right to have him come as close as you want to, to look at him, you have the right to examine the scars.

Juror No. 3: (Examining scars on plaintiff's head) This is the worst place here, is it?

Mr. Cain: Yes, sir, down that way (indicating).

Juror No. 3: That is all, I guess.

(Jury retires at 3:25 P. M.)
(Jury returns at 4:20 P. M.)

COLLOQUY BETWEEN COURT AND JURY

The Court: Gentlemen, you have sent word that you have been able to agree on the first count but not in the second count. Have you, in the meantime, since sending word, agreed on the second count?

The Foreman: Not thoroughly, your Honor.

The Court: Do you think there is any prospect of agreeing on the second count?

The Foreman: I think the chances are better than when we sent the note out. I am only speaking for myself but that is the way I feel personally.

The Court: Well, I will do whatever counsel here wants to have me do.

Mr. Cuff: Well, I think it would be a good idea to let [fol. 473] them deliberate a little longer if they think they can agree on the second count.

The Foreman: I take it, we must answer that second count.

The Court: You must answer on both counts.

Juror No. 5: Your Honor, will you please give us that second count over again?

The Court: The second count was—I don't want to know what your answer to the first count is, gentlemen—the second count was that if Jackson was pretty drunk, was drunk, and that he was not able to do his job, and if the captain knew this and nevertheless let him act with authority, and if he cracked Cain over the head, then it does not make any difference why he cracked him over the head, if he did crack him over the head, he has no business to let him be in a position where he could crack him over the head, and he was negligent in letting him be in that position. That is the charge that the plaintiff would have to sustain. He would have to satisfy you on those points in order to win on the second count.

Now, I have changed what I said a minute ago as to not finding out what you have done. If you have agreed in

favor of the plaintiff on the first count, then it does not make any difference what you do on the second. If you agreed in favor of the defendant on the first count, then it [fol. 474] is important for you to get together again and see if you can agree on the second count. It is up to you to tell me whether you have to go back again or not.

The Foreman: We don't have to go back.

The Court: Do you mean that you have agreed in favor of the plaintiff on the first count?

The Foreman: Yes.

(Reading of the jury roll is waived.)

VERDICT

(The jury returned with the verdict in favor of the plaintiff in the sum of $12,000, on the first count.)

The Court: I will adjourn this case until Wednesday, August 8th, at ten-thirty A. M., in order to hear any motions and for any argument at that time.

[fol. 475] DEFENDANTS' EXHIBIT A FOR IDENTIFICATION

(Statement Showing Signature)

[fol. 476] Defendants' Exhibit A for Identification.

Important.—An immediate investigation should be held by ship's officers, of every accident, however slight. Signed statements of witnesses should be attached to this form. Send this report to the owners without delay. Report all injuries to crew, stevedores or other persons.

REPORT OF PERSONAL INJURY

S. S. Alpha. Flying what flag? American. Date of sailing: Jan. 25. Voyage No. 27.

1. Injured person: Name: Robert Kane; address, #25 South St.; age: 38; color, white; married? yes; how many children? 3; occupation, fireman; name of nearest relative:

Margret Kane; address: #44 Hyslop St., Liverpool, Eng.

2. Date man signed: On Jan. 25/27. Where? Phila., Pa. Before whom? U. S. Commission.

3. Date crew paid off for current voyage, if known: Feb. 15/27.

4. Date upon which man was paid off: Feb. 15/27. Where? New York. Before whom? U. S. S. Commission. Amount of wages paid: $46.17.

5. Wages per month: $65.00.

6. (a) In whose employment: Alpha S./S. Corp. (b) How long employed? ——.

7. Injury received: (a) Date: Port Feb. 6th; (b) hour: 12:40 a. m.; (c) place Port Side, Eng., P. dock; (d) to whom first reported: Captain; (e) when: Im-ediately.

8. In what port was ship at time of accident? Amnaf, Venezuela.

9. Describe fully how and where the accident happened: At or around Hatch on Port Side of Engine room on poop deck. I had gotten up to come on watch and I believe that when I fell that I either struck the Hatch combing or pipe covering.

10. Describe as fully as possible nature and extent of injury: Slight Flesh wound about ¾" long over left eye, scalp Wound about 3" above left eye and 2½" above left ear.

[fol. 476½] Reverse Side of Defendants' Exhibit A for Identification

11. State what was done for the man after the accident, with name and address of attending physician or hospital, if any: Captain. Im-ediately dressed the Wounds.

12. State probable period of disablement: No time lost.

13. Give statement, if any, made by injured person: That the foregoing is my own personal Statement.

14. Name of person in charge or superintending work at time of accident: —— ——.

15. Was man able to return to duty? If so, when? Did not al-ow him to return to duty by order of Captain that day.

16. Was steamer loading or discharging? From or to dock or lighter? ——.

17. What machinery or gear was in use, and was it in good order? ——.

18. (a) Was the man perfectly sober? So far as Known. (b) Was he careless? Not intentional so far as Known. (c) Was any other person at fault? If so, who and in what way? No.

19. Was substitute signed on? ——. On what date? ——. 20. Name of substitute: —— ——.

Signature of Master, Surgeon or Officer, —— ——.

Date: —— —, ——.

Names of witnesses to accident and persons assisting in work: —— ——.

Home address: Robert Kane, 44 Hyslop St., L'pool, England.

[fol. 477] DEFENDANTS' EXHIBIT B

Alpha. Inj. Robert Cain. 2/6/27

J. B. Stewart, Wiper

1223 N. W. 7th Court, Miami, Fla.

I am at present employed as Wiper on the S/S Alpha which position I have held since Feb. 16, 1927. Prior to that I was Ordinary Seaman from Jan. 25, 1927 to Feb. 15, 1927.

I remember Robert Cain who was a fireman on this vessel during my first voyage.

On Feb. 6, 1927 while the vessel was in a Venezuelan port about 12:30 A. M. I was standing on poop deck stbd. side just outside of engineroom door. I saw Cain come running around the corner of the poop from the port side. His face and the front of his shirt were covered with blood. I called to him to stop but he did not answer and continued to run forward. A few seconds later the 2nd Asst. Eng. came from the same direction that Cain came from—he had a flashlight in one hand and a monkey wrench in the other and he hollered to me "stop him" meaning Cain—By that time Cain was nearly amidships main deck, stbd. side. I got up and started after him just before Cain reached the midship housing he tripped over a valve and fell forward

on his hands and knees. I did not see whether or not he struck anything in falling. He regained his feet almost [fol. 478] immediately and continued to run forward disappearing around the corner of the midship housing. I thought he had run forward and went forward to see if I could find him without avail. So I walked back amidship and on looking thru a porthole of the saloon saw the Captain and Steward dressing the wounds on Cain's head.

Cain did not say anything to me about the 1st Asst. Eng. striking. I did not see anyone strike Cain. Cain told me that the 2nd Asst. Eng. hit him with a wrench because he was late going on watch.

The same night I asked the 2nd Asst. Eng. why he had struck Cain. The 2nd Asst. Eng. denied having struck Cain saying that Cain had fallen and as a result of the fall sustained the injuries to his head. The 2nd Asst. Eng. did not say where Cain had fallen.

(Signed) James B. Stewart, March 14, 1927.

[fol. 479] In United States District Court

[Title omitted]

Stipulation as to Printing of Exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that defendants' Exhibit "C," the Official Log of the S.S. "Alpha" for the voyage ending February 15th, 1927, which was marked in evidence upon the trial of the above entitled action, may be transmitted to the Circuit Court of Appeals in its original form and may be used by either party on the argument of said appeal, with the same force and effect as if said exhibit was included in the foregoing transcript of record.

Dated New York, April 11th, 1929.

Thomas J. Cuff, Attorney for Plaintiff. Hatch and Wolfe, Attorneys for Defendants.

[fol. 480] In United States District Court

Stipulation and Order Settling Bill of Exceptions

The foregoing contains all the testimony and exhibits material to the issues herein and it is hereby stipulated that

the same may be settled and ordered on file as the bill of exceptions herein.

Dated New York, April 18, 1929.

Thomas J. Cuff, Attorney for Plaintiff. Hatch and Wolfe, Attorneys for Defendants.

So ordered. J. W. Mack, Circuit Judge.

[fol. 481] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the defendants, Alpha Steamship Corporation and William H. A. Walker and Frank Daly, copartners doing business under the firm name and style of Walker & Daly, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, at the next term thereof to be held at the Court Rooms in the Post Office Building, Borough of Manhattan, City of New York, from the judgment entered in the office of the Clerk of this Court on the 3rd day of January, 1929, in favor of the plaintiff, for the sum of Twelve Thousand Three Hundred [fol. 482] and Fifty-nine Dollars ($12,359), and against the defendants, as amended, and from the order entered in the office of the Clerk of this Court on the 3rd day of January, 1929, denying the defendants' motion to set aside the verdict and for a new trial, and from each and every part of said judgment and order, as well as the whole thereof.

Dated New York, January 31st, 1929.

Yours, etc., Hatch and Wolfe, Attorneys for Defendants.

Office & P. O. address: 27 William Street, Borough of Manhattan, City of New York.

To Thomas J. Cuff, Esq., Attorney for Plaintiff, 51 Chambers Street, New York City; Alex. Gilchrist, Jr., Esq., Clerk.

[fol. 483] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable the Judges of the United States Court for the Southern District of New York:

The above named Petitioners, Alpha Steamship Corporation and William H. A. Walker and Frank Daly, co-partners doing business under the firm name and style of Walker & Daly, feeling aggrieved by the judgment entered in the office of the Clerk of this Court on the 3rd day of January, 1929, in favor of the plaintiff for the sum of $12,359.00, and against the defendants, as amended, and by the order entered in the office of the Clerk of this Court on the 3rd day of January, 1929, denying the defendants' motion to set aside the verdict of the jury and for a new [fol. 484] trial as specified in the Assignments of Error. filed herewith, and pray that their appeal be allowed and citation be issued as provided by law and that a transcript of the records, proceedings and documents upon which said judgment and order was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit, and that your Petitioners may be permitted to file a supersedeas bond in the sum of $12,729.77 covering the amount of the judgment entered herein, together with interest for six months, with good and sufficient security that appellant shall prosecute his appeal to affect and answer all damages and costs, if he fails to make his plea good.

Dated February 1st, 1929.

Hatch and Wolfe, Attorneys for Defendants.

Office & P. O. address: 27 William Street, Borough of Manhattan, City of New York.

Upon filing a supersedeas bond in the sum of Twelve thousand seven hundred and twenty-nine and 77/100 ($12,729.77) filed herewith, the foregoing appeal to the United States Circuit Court of Appeals is allowed.

Dated February 2nd, 1929.

Henry W. Goddard, District Judge.

[fol. 485] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

And now come the defendants, Alpha Steamship Corporation and William H. A. Walker and Frank Daly, copartners doing business under the firm name and style of Walker & Daly, and in connection with their appeal in this case assign the following errors, which the defendants, Alpha Steamship Corporation and William H. A. Walker and Frank Daly, copartners doing business under the firm name and style of Walker & Daly, now the appellants, aver occurred at and before the trial of the issues of law herein, on which they reply to reverse the judgment entered herein as appears of record:

[fol. 486] First. In that the Court, over the objection and exception of the defendants, permitted the plaintiff to prove loss of earning capacity and future wages, as follows:

"Q. Did that include your board and lodging on the boat?

A. Yes, sir.

Q. I mean, that you had board and lodging on the boat without paying for it, is that right?

A. Yes, sir.

Q. Now when you are off the boat, how much do you have to pay for board and lodging per week, about?

Mr. Wolfe: I object to that as not being pleaded in the bill of particulars.

The Court: Is the bill of particulars attached here?

Mr. Cuff: Your Honor please, I am not showing it for loss of money. We are showing it for loss of earning power.

Mr. Wolfe: You have not pleaded a loss of earning power.

Mr. Cuff: Paragraph 9 of the complaint refers as follows: 'That plaintiff has been and will be permanently prevented from attending to his usual duties and occupation.' That is the ninth folio, paragraph nine.

The Court: He may show under the ninth allegation, unless there is something asked for in the bill of particulars. He may show he got his board and lodging with

$62.50, all together, making up his total wages and by rea-
[fol. 487] son of this he was then out of employment and he had to spend so and so much to live.

Mr. Wolfe: He has not pleaded that he has lost any wages. There is no such allegation anywhere that I can find.

The Court: It reads: 'He has been and will be permanently prevented from attending to his usual duties and occupation.' I think that is sufficient. The objection is overruled.

Mr. Wolfe: Exception." (pp. 8, 9, 10.)

Second. In that the Court refused to grant the motion of the defendants to dismiss the complaint at the close of plaintiff's case, as follows:

"Mr. Wolfe: If your Honor please we move to dismiss the first, second, third, fourth and fifth causes of action——

The Court: The fourth cause of action has been withdrawn.

Mr. Wolfe: All causes of action except the fourth, which was withdrawn. My understanding of the law with respect to the first cause of action, and the second and third causes of action is as follows: The defendant in an assault case is not liable unless the assault was committed with the knowledge and consent of the defendant or its master of the vessel. The testimony in the case thus far is——

[fol. 488] The Court: What about that, Mr. Cuff?

Mr. Wolfe (continuing): Unless the owners employ a notoriously brutal man. Under my understanding of the law, the owner is not liable for any assault committed. Now there is no testimony here on which it seems to me that the defendant can be held. On the plaintiff's own statement of fact. This was nothing more than, what I should call, nothing more or less than a drunken brawl, that is if the facts are accurate.

The Court: I cannot agree with that at all. According to the plaintiff's testimony up to now the plaintiff was derelict in not being out at the right hour, if being late. His superior officer finding him out late, and not getting a proper excuse, no excuse that in his judgment was proper for being late, proceeded, as a superior officer, to give him a licking he did not, according to the testimony up to now enter into any private quarrel, but in his capacity as officer

by way of chastisement for being derelict in duty. The whole circumstances I hold, is a matter of law if the jury believe the facts.

So if, of course, there are not any contradictions of this evidence, it will be the duty of the jury to find against the defendant in this matter.

Mr. Wolfe: Isn't your Honor drawing certain conclusions from the evidence which do not appear?

[fol. 489] The Court: I am drawing only such conclusions that the jury has a right to draw from the facts, and if the jury draw those conclusions it would be their duty to find accordingly. We cannot hold, as a matter of law, that the jury would not have a right to draw these conclusions of facts from the evidence.

Mr. Wolfe: The testimony thus far in my opinion does not seem to indicate a conclusion which your Honor has drawn. Namely that this was done in the line of duty.

The Court: It is whether the jury is liable to find, as a reasonable man would have the right to draw.

Mr. Wolfe: That this assaut was committed in line of duty. The testimony thus far indicates that the second assistant was drunk.

The Court: That would make no difference. He is still a superior officer. It would not make a particle of difference.

Mr. Wolfe: Does your Honor know as a matter of law that any superior officer on board a vessel charged with maintaining discipline and punishment.

The Court: I do not say that. I say that this fireman was derelict in his duties, and the company is liable, if in the course of his duty he is assaulted unnecessarily and improperly, without justification.

[fol. 490] Mr. Wolfe: Without justification you say, your Honor.

The Court: Without justification, yes. The fact that he was late is no justification for doing what has been testified to in this case. Whether or not this was done is for the jury to determine after hearing all the evidence.

I deny your motion and you may have an exception.

Mr. Wolfe: I take an exception, your Honor, thank you." (pp. 163, 164, 165, 166.)

Third. In that the Court failed and refused to grant the motion of the defendants to dismiss the complaint at the close of the entire case.

"Mr. Wolfe: That is all.

I at this time, your Honor, renew my motion that I made at the end of plaintiff's case.

The Court: Same ruling, motion denied."

Fourth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

"Mr. Wolfe: I ask your Honor to charge that the master of the vessel is the supreme officer and that he has sole and exclusive authority on board of his vessel, and no other officer has authority to administer discipline, except in the [fol. 491] absence or incapacity of the master, by express delegation from the master.

The Court: Well, I will give it this way. The master of course is the boss. Everybody is under him. Now each officer in turn does have authority unless he has done something that takes it away from him, over the fellows under him. There is nothing in this case to show that any rights were taken from Jackson, any rights that he would ordinarily have as being second assistant engineer, over the firemen who were under him.

Mr. Wolfe: I respectfully except."

Fifth. In that the Court failed and refused to charge the jury, as requested by the defendants, as follows:

(Mr. Wolfe: "I ask your Honor to charge the jury that the jury must find a verdict in favor of the defendant unless they find that the assault was committed with the knowledge and consent of the master.

The Court: I say on the second count that if the master knew that Jackson was so drunk at that time as to be unfitted to do his duty, if he knew that, and he let him go and act, and if then, although the master knew nothing about it, Jackson hit this fellow on the head, the ship would be responsible, the owners and ship operators would be re-[fol. 492] sponsible because in that case it was due not merely to Jackson's wrong, but to the master's wrong in permitting the man whom he knew to be in that condition, to be in authority.

There are a lot of ifs in that, gentlemen, and it is up to you to find them.

Mr. Wolfe: Exception."

Sixth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

(Mr. Wolfe:) "I ask the Court to charge the jury that there is no evidence from which the jury can find that the defendant failed to use reasonable and due care in the selection of the second engineer Jackson.

The Court: That is not in the case.

Mr. Wolfe: I ask the Court to charge the jury that the defendants are not liable for an act or acts of an employee authorized to direct or supervise other employees where such act is outside the scope of the authority controlling.

The Court: I have explained that already to the jury

Mr. Wolfe: Exception."

Seventh. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

(Mr. Wolfe:) "I ask the Court to charge the jury that [fol. 493] the agency of the master for the owners, includes all those acts which are fairly embraced within the scope of his appointment and which would be in the line of his duty, but when he injures his men by assault, such assault is one of the risks assumed on entering the employment of the vessel, and if the jury finds an assault was committed by the second assistant engineer, such assault was without the scope of his employment, and the owners will not be presumed to have assented thereto.

The Court: I refuse so to charge.

Mr. Wolfe: Exception."

Eighth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

(Mr. Wolfe:) "I ask the Court to charge the jury that the second assistant engineer was not the defendant's representative for the purpose of providing the plaintiff with good treatment and care.

The Court: Yes, but that has nothing to do with the case.

Mr. Wolfe: Under the second cause of action.

The Court: Go ahead.

Mr. Wolfe: I ask the Court to charge the jury that if the jury finds that an assault was committed when either [fol. 494] the plaintiff or the second assistant engineer was drunk, they must find a verdict for the defendant.

The Court: No.

Mr. Wolfe: Exception."

Ninth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

(Mr. Wolfe:) "I ask the Court to charge the jury that the defendants are not liable for the injuries caused by one fellow servant to another fellow servant due to an assault, unless the assault was ratified by the master.

The Court: No.

Mr. Wolfe: Exception."

Tenth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

(Mr. Wolfe:) "I ask the Court to charge to the jury that the plaintiff was a fellow servant of Jackson and takes the risk of injury caused by the negligence or assault of Jackson, his fellow servant.

The Court: That has not anything to do with the case.

Mr. Wolfe: Exception."

Eleventh. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

[fol. 495] (Mr. Wolfe:) "I ask the Court to charge the jury that if the jury find that the master willfully neglected to prevent an assault on this plaintiff, in violation of his duty to the owners of the vessel, the jury must bring in a verdict in favor of the defendant.

The Court: I will not so charge because it has no application to the case.

Mr. Wolfe: Exception."

Twelfth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

"Mr. Cuff: I ask the Court to charge the jury that if the jury finds that the defendant's second engineer, Jackson, struck the plaintiff with a wrench, and finds the de-

fendant liable under the law, as your Honor has charged it on either the first or the second situation, that if they also find that Cain was drunk that situation would be immaterial in the event that a verdict should be for the plaintiff.

The Court: No, that he was drunk, if he was drunk, would not justify hitting him over the head with a monkey wrench, if he was hit over the head with a wrench.

Mr. Wolfe: I except to that."

Thirteenth. In that the Court failed and refused to charge the jury as requested by the defendants, as follows:

[fol. 496] (Mr. Wolfe:) "I ask your Honor to charge the jury that if they find that both Cain and Jackson were drunk, then there is no liability at all.

The Court: No, no. I will not charge that.

Mr. Wolfe: Exception."

Fourteenth. In that the verdict of the jury in the sum of Twelve Thousand Dollars ($12,000) was excessive, and the Trial Court failed and refused to either reduce or set aside said verdict as excessive.

Wherefore these appellants pray that the judgment of the United States District Court within and for the Southern District of New York be reversed.

Hatch and Wolfe, Attorneys for Appellants.

Office & P. O. address: 27 William Street, Borough of Manhattan, City of New York.

Copy received Feb. 2, 1929. Thos. J. Cuff, Atty. for Pltf.

[fols. 497-501] Supersedeas bond on appeal for $12,729.77 omitted in printing.

[fols. 502-506] Cost bond on appeal for $250.00 omitted in printing.

[fol. 507] Citation, in usual form, omitted in printing.

[fol. 508] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO THE RECORD

It is hereby stipulated and agreed, that the foregoing is a true copy of the transcript of the record of the said District Court in the above entitled matter, as agreed upon by the parties.

Dated New York, April 26th, 1929.

Hatch and Wolfe, Attorneys for Defendants-Appellants. Thomas J. Cuff, Attorney for Plaintiff-Appellee.

[fol. 509] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 510] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1928

No. 367

Argued June 4, 1929. Decided August 20, 1929

ROBERT CAIN, Plaintiff-Appellee,

v.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER, and Frank Daly, Copartners, Doing Business under the Firm Name and Style of Walker & Daly, Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Action at law brought by Robert Cain against the Alpha Steamship Corporation, as owner, and Walker & Daly, as operators, of a steamship, to recover for personal injuries sustained by plaintiff while employed as a fireman on said

steamship, by reason of an assault committed upon him by his superior officer, the second assistant engineer. Upon verdict of a jury for the sum of $12,000, judgment was entered for plaintiff, and the defendants have appealed. Affirmed.

Hatch & Wolfe, of New York City (Carver W. Wolfe, of New York City, of counsel), for appellants.

Thomas J. Cuff, of New York City (Vine H. Smith, of New York City, of counsel), for appellee.

OPINION

SWAN, Circuit Judge:

This is an action at law for an assault upon a seaman by a subordinate officer, while both were employed upon an American vessel owned by one of the defendants and operated or controlled by the others. It was committed on shipboard when the vessel lay in a Venezuelan port. Jurisdiction of the District Court is founded upon diverse citizenship. The parties have assumed, and rightly so, that the law applicable to this situation is the general maritime law of the United States. See Roberts v. Skolfield, Fed. Cas. No. 11,917; Port of New York Stevedoring Corp. v. Castagna, 280 F. 618, 624 (C. C. A. 2); Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 927; Northern Coal Co. v. Strand, 278 U. S. 142, 144, 49 S. Ct. 88, 73 L. Ed. —. Compare critical articles in 36 Harv. Law Rev. 777; 21 Columbia Law Rev. 645; 55 Am. Law Rev. 685; 53 Am. Law Rev. 749.

The case was left to the jury upon the theory that, if Jackson, the second assistant engineer, actually struck Fireman Cain, not in the course of a private brawl, but in the exercise of his authority over him as his superior officer, the defendants would be liable. This theory the defendants dispute, contending, first, that it misstates the rule of the maritime law; and, second, that, even if the law be as stated, the evidence was insufficient to justify a finding that Jackson was acting within the scope of his authority in striking the blows with which he was charged. Both questions were properly saved for review by exceptions to the court's denial of motions to dismiss the complaint.

The alleged insufficiency of the facts may conveniently be considered first, for, if that be disposed of favorably to the defendants, it will be unnecessary to determine the more difficult question of law. Cain's testimony is that he started [fol. 511] to go down to the engine room some 40 minutes late for his watch; that on the first landing of the stairway he met the first assistant engineer, and became engaged in an altercation with him concerning his tardiness; that he (Cain) retreated to the top of the stairs, and from there saw the first assistant engineer talking to Jackson, who was the officer on duty in the engine room; that the latter thereupon proceeded up the stairway toward him. Cain claims Jackson was drunk. What happened when Jackson reached the top of the stairs Cain relates as follows:

"He told me I was a bit late. I says to him, 'Yes, I am a bit late, I overslept;' and he said 'Late be damned;' and he says to me, and he struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him. • • •"

Jackson pursued him, saying, "I will teach you to go down on watch, you bastard." Cain ran to the captain and reported that he had been struck by Jackson. The captain, however, says that Cain explained later that his wounds were the result of falling on the deck. This was also Jaskson's contention. He denied striking any blow whatever. He says the first assistant told him Cain was drunk; that he thereupon went up the stairs to get another fireman; that Cain had his head in the port engine room door, and "I hollered to him to come on down." Cain did not obey, and Jackson says that by the time he had reached the top of the stairs Cain had fallen down, and was getting to his feet and starting to run away. He admits that he followed Cain along the deck, shouting to him to stop.

Without reciting more of the evidence, it will suffice to say that, assuming the law to be as the court stated it, the evidence raised issues for the jury. Jackson's duty was to get Cain to work, if he thought Cain was able to work. The jury were entitled to find that he approached Cain for that purpose. He himself says, "I hollered to him to come on down." They were also entitled to believe Cain's

version of what transpired when the two men met at the top of the stairway. Hence they might infer that Jackson gave the blows for the purpose of compelling Cain's immediate attendance and in connection with reprimanding him for his tardiness. Although excessive violence was used, this is not conclusive that Jackson was not acting in the ship's business. The evidence made it a jury question whether he committed the assault as an officer of the ship, in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blows in a private brawl. In Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, a very different situation was presented. There the killing of the conductor resulted from the engineer's personal rancor, and was not in furtherance of the employer's business. Here we must accept the jury's verdict as a finding that Jackson's blows were not given in a private brawl, but in the exercise of his authority as an officer. Hence we must determine the legal question first mentioned.

The rule of the common law, as established by the weight of modern authority, imposes liability upon an employer for an assault committed by one of his employees upon another, when the latter is in a position of authority and acts within the general scope and line of his employment. Encarnacion v. Jamison, 251 N. Y. 218, 167 N. E. —; Richard v. Amoskeag Mfg. Co., 79 N. H. 380, 109 A. 88, 8 A. L. R. 1426; Fleming v. Tarboro Knitting Mills, 161 N. C. 436, 77 S. E. 309: Rogahn v. Moore Mfg. Co., 79 Wis. 573, 48 N. W. 669; Jebeles-Colias Confectionery Co. v. Booze, 181 Ala. 456, 62 So. 12; Mechem, Agency (2d Ed.) § 1960 et seq.; annotation in 18 L. R. A. (N. S.) 416; 7 Harv. Law Rev. 383 (for historical review by Prof. Wigmore). The plaintiff asserts that the same principle obtains in the maritime law. This the defendants deny, their contention being that a seaman's rights are exclusively those stated in The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, namely, wages, maintenance, and cure, if the seaman falls sick or is wounded in the service of the ship regardless of the cause of his wounds, and indemnity for injuries received in consequence of unseaworthiness of the ship, or failure to supply and keep in order proper appliances appurtenant thereto.

Admittedly, the propositions laid down in the opinion are much broader than were required by the actual decision, which was that a seaman cannot maintain a libel in rem to recover indemnity for personal injuries caused by the negligence of the master of the vessel. But the dicta were a considered exposition of the maritime law after a careful historical review of British and European rules, as well as [fol. 512] American. After referring to the fact that British law grants a seaman indemnity for injuries received through unseaworthiness of the vessel, the opinion states on page 171 of 189 U. S. (23 S. Ct. 485):

"Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. The Agincourt, 1 Hagg. Adm. 271; The Lowther Castle, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in general admiralty rule 16 [now rule 15; see 28 U. S. C. A. § 723], declaring that 'in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.'"

Having thus directed its attention to injuries resulting from assaults, it would seem strange for the court, had it thought an action in personam would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless, the propositions laid down in The Osceola opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his vessel and her owners, in view of the later decision in The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955. There it was held that for negligent treatment of a seaman after he was injured a right to indemnity existed. Moreover, the appellants concede another exception, namely, the seaman's right to indemnity when the master himself commits the assault. Numerous cases in the lower federal courts, though not with unanimity as to the propriety of a proceeding in rem, have held the ship or her

owners liable to indemnify a seaman assaulted by the master, or by another with the master's acquiescence, or by a subordinate of notoriously brutal temper. In the last instance, when the injuries are inflicted by a notoriously brutal officer, liability has been rested upon the duty properly to man the vessel in order to make her seaworthy. The Rolph, 299 F. 52 (C. C. A. 8). For cases relating to liability of ship or owner when the assault is committed by the master himself, or by another in his presence, see The Marion Chilcott, 95 F. 688 (D. C. N. D. Wash.); The Lizzie Burrill, 115 F. 1015 (D. C. Ala.); The Astral, 134 F. 1017 (D. C. E. D. Pa.); The Sallie Ion, 153 F. 659 (D. C. E. D. Pa.); The Vueltabajo, 163 F. 594 (D. C. Ala.); The David Evans, 187 F. 775 (C. C. A. 9); Gabrielson v. Waydell, 67 F. 342 (C. C. E. D. N. Y.); Wolfe v. Thomas, 268 F. 464 (C. C. A. 6); see, also, article in 19 Harv. Law Rev. 418. Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793, which held the contrary, is no longer the law of New York. Encarnacion v. Jamison, supra.

It is true that this doctrine is of comparatively recent growth. In Curtis, Merchant Seaman, p. 339, the learned authod says: "Whether the shipowner would in any case be liable for the consequential injuries occasioned by excessive punishment of a mariner, by a master, is a point which I have never known to be raised." On general principles of agency, as they were then understood, he proceeds to argue against liability. Compare, however, the statement, at page 26, that it is part of the obligations implied from the mariner's contract that he "shall be treated with decency and humanity by the master and the officers, and by his shipmates." It is true, also, that the Supreme Court has never passed upon the question. We believe, however, that the above cases correctly declare the maritime rule that a shipowner is responsible for injuries to a seaman resulting from an unjustifiable assault by the master, or by another with his acquiescence, committed in furtherance of the ship's business. We conclude, therefore, that The Osceola cannot be deemed to have laid down a complete statement of an injured seaman's right to indemnity, and that the question of the defendants' liability in the instant case is open to independent consideration.

While conceding that the shipowner is bound by an obligation, implied from the seaman's contract of employment,

to furnish him humane and decent treatment, the appellants assert that this obligation is violated only when brutality is committed by the master, or by another with the master's acquiescence. No case has been cited which extends this theory of liability to the acts of a subordinate officer committed outside the presence of the master. We pass without decision the question whether this theory is necessarily so limited, for it is not upon this theory, but upon the theory of respondeat superior, that the plaintiff relies to sustain his right to recover.

[fol. 513] To the theory of respondeat superior the appellants reply that all members of a vessel's crew, except perhaps the master, are fellow servants as between themselves, and that the fellow-servant exception to the doctrine of respondeat superior includes willful as well as negligent acts of a fellow employee. The fellow-servant defense has almost always been stated as applicable to injuries caused by negligence. Only two cases have been found which discuss its applicability to a willful assault. In Memphis & Newport Packet Co. v. Hill, 122 F. 246 (C. C. A. 8) the contention was rejected. In Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969, 17 L. R. A. 228, 31 Am. St. Rep. 793, it prevailed, but, as already noted, that case has very recently been overruled, though chiefly upon the ground of subsequent congressional legislation. Encarnacion v. Jamison, supra.

In the absence of compelling authority we see no valid reason to extend the fellow-servant exception beyond the field of negigence. Even in its restricted scope it has not escaped criticism, and has by statute frequently been curtailed or abolished. It was abolished in respect to negligent injury of railroad employees engaged in interstate commerce by the Federal Employers' Liability Act (35 Stat. 65 [45 USCA §§51-59]), and the benefits of that legislation were by the Jones Act extended to seamen who suffer personal injury in the course of their employment (41 Stat. 1007 [46 USCA § 688]). While the plaintiff's cause of action cannot, in our opinion, be rested upon the Jones Act (compare Encarnacion v. Jamison), which by incorporating the Federal Employers' Liability Act requires negligence as the foundation of liability (Chesapeake & O. Ry. Co. v. Stapleton [May 27, 1929] 49 S. Ct. 442, 73 L. Ed. —), the

statutes may appropriately be referred to as showing the legislative tendency already mentioned.

Precise authorities are surprisingly few and unconvincing. The General Rucker, 35 F. 152 (D. C. W. D. Tenn.), was a libel in personam against the owner for personal injuries caused by an assault by the mate. The libelant was decreed $100 damages and costs. This case is of little value as a determination of the maritime rule, for the court says (page 157):

"It is not all all necessary to consider here the question whether a court of admiralty proceeds against the owner of a vessel upon distinct grounds of its own growing out of the peculiar relations that exist as between the owner and those engaged about navigating a vessel of commerce, in cases like this, or only enforces the ordinary common-law principles of master and servant; for it is conceded by the learned counsel that the defendant is liable on the common-law principle, and to that extent certainly; and, I find no difficulty in adjudging that this case falls clearly within that principle. * * * But, after all this case falls, in my judgment, within the Tennessee rule of liability. * * *"

Memphis & Newport Packet Co. v. Hill, 122 F. 246 (C. C. A. 8), affirmed the decree entered for libelant in a libel in personam for an assault committed by a deck hand who had been selected by the officer in command of the vessel to act as captain of the watch. The opinion holds that the fellow-servant doctrine has no application to a willful assault by one acting as a subordinante officer; it applies the general principles of agency, and cites with approval The General Rucker, supra. There is no consideration of the question whether the maritime rule differs from that of the common law.

The Wawalona, 1925 A. M. C. 552, an oral opinion by Judge Wolverton, appears to hold that the owner is not liable for an assault committed by the chief officer, but that he himself is.

These three cases are the only ones discovered in which a seaman has attempted to hold the shipowner for an assault committed by a subordinate officer without the acquiescence of the master. None of them discuss the possibility of the maritime law having a rule different from the common law, or the possible inconsistency between holding a shipowner

for the willful torts of a subordinate officer and exempting him for the latter's negligent torts.

If the exemption of the ship owner from liability, beyond maintenance and cure, in case of negligene injury to a seaman, is to be explained on the fellow-servant doctrine, as intimated in The Osceola, we should have little difficulty in refusing to extend the doctrine to the case of willful torts committed in furtherance of the ship's business. But Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171, seems to suggest that the exemption is based on a much broader principle. That case was an action at law removed from a state court on the ground of [fol. 514] diverse citizenship. Plaintiff, a fireman, sought indemnity from the shipowner for injuries caused by negligence of the second engineer. Recovery beyond maintenance and cure was denied. The court adopted as the applicable substantive law the maritime rule recognized in The Osceola.

The most significant point for present purposes is the court's treatment of section 20 of the Act of March 4, 1915 (38 Stat. 1164), which provided: "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority." If the doctrine of respondeat superior were generally applicable to maritime torts, this statute would seem to have destroyed the fellow-servant defense and to render the vessel owner liable for negligent injuries caused by a subordinate officer. But the court held the statute irrelevant, saying: "But the Maritime Law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship; it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow servant; the statute is irrelevant."

The implication seems to be that the shipowner's liability does not depend on the rule of respondeat superior, but results as an incident of the ownership of the vessel. If the maritime law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer. Certain writers on the subject have denied that the

common-law rule of respondeat superior has received general acceptance in the admiralty. See 19 Harv. Law Rev. 445; 36 Harv. Law Rev. 777. Moreover, the appellants urge, it can scarcely de deemed without significance that in all the early cases the assaulted seaman sued only the master or the subordinate officer who committed the assault. Roberts v. Skolfield, Fed. Cas. No. 11,917; Anderson v. Ross, Fed. Cas. No. 361; Backstack v. Banks, Fed. Cas. No. 711; Hanson v. Fowle, Fed. Cas. No. 6,042; Thomas v. Lane, Fed. Cas. No. 13,902; Murray v. White, 9 F. 562 (D. C. Me.).

Spencer v. Kelley, 32 F. 838 (C. C. N. D. Ohio) was the first attempt which has come under our observation to hold the owner liable for an assault by the master upon a seaman. It reports the court's charge to the jury, and, so far as appears, the court charged according to the common-law rule, without considering whether the maritime rule was different. Judge Brown, in The City of Alexandria, 17 F. 390 (D. C. S. D. N. Y.), recognized the absence of authority as strong evidence that the maritime law did not compel payment of indemnity for injuries due to negligence. Although absence of authority is by no means conclusive, it may properly be deemed evidence of the general opinion of the profession.

While not unmindful of the force of the foregoing arguments, we remain unconvinced that the maritime rule differs from that of the common law in respect to the liability of the employer for willful torts committed by a subordinate officer of a vessel acting within the scope and course of his employment. Admittedly the principle of respondeat superior makes liable the shipowner when the assault is upon a passenger. No reason except the fellow-servant doctrine has been advanced for its nonapplicability when the assault is upon a seaman, and, as already indicated, that doctrine should not be extended to cover willful torts. We do not believe that the dicta of The Osceola, or the implications of the Chelentis decision, should be pushed beyond the field of negligence, with which those cases dealt.

Nor is the absence of early authorities recognizing the shipowner's obligation, sufficient evidence that no such obligation exists. The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is

conducted, as well as changes in economic notions of where loss suffered in the course of a business should fail, should be reflected in the action of the courts, though it result in filling pages which history left blank. Absence of precedent did not preclude recognition by the common-law courts of the modern view that a principal should answer for the willful torts of his servant committed in the furtherance of his master's business. The principle is equally applicable to the business of shipping, and we find no binding authority which forbids its application in the maritime law. On the contrary, such authority as there is favors it.

In addition to the cases already cited reference may be [fol. 515] made to Hughes, Admiralty, § 106, where the author asserts that the owner would be liable "if the assault was made by any of the crew within the course of his employment," and to the views of the author of a scholarly article in 19 Harv. Law Rev. 418. As suggested in the article last mentioned, a law which would excuse the owner when the officer is careful to exercise brutality upon a well seaman, but declares him responsible, should the mariner happen to be ill at the time of the assault, could scarcely be deemed satisfactory.

It is urged that the statute which imposes liability upon the master or the ship or her owner in case the master negligently permits the escape of any officer who has inflicted corporal punishment upon a seaman (46 USCA § 712) indicates that no such liability existed without the statute. To this we cannot accede. The statute creates a new ground of liability against the master, and the declaration that ship or owner are also liable may have been inserted to preclude the contrary inference, which might have been drawn had the master's liability alone been mentioned.

While we recognize that the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business. The denial of the motions to dismiss the complaint was, therefore, not error.

Complaint is made because the court refused to charge that no subordinate officer has authority to administer discipline without express delegation from the master. As an abstract legal proposition this may be true. United States v. Taylor, Fed. Cas. No. 16,442; Murray v. White,

9 F. 562 (D. C. Me.). But, if charged in the form requested, it would have been likely to mislead the jury into the belief that the defendants could not be held responsible for Jackson's assault, if they should find he committed one. Obviously a blow with a monkey wrench was not a proper way to administer discipline, and the jury had in effect been previously so told. Jackson, as Cain's superior officer, had authority to order him on duty, or to reprimand him for being late, and if in connection with such an order or such a reprimand he used physical violence, for the purpose of forwarding the ship's business, the owner may be held liable. We do not regard as error the refusal of the requested charge.

The claim that the verdict is excessive was presented to the District Court upon a motion for a new trial. There was no abuse of discretion in denying that motion. The amount of the verdict is not for us to review. See Ramsdell v. Goumis, 228 F. 864 (C. C. A. 2); Detroit Taxicab & Trans. Co. v. Pratt, 2 F. (2d) 193 (C. C. A. 6); Bowman-Hicks v. Robinson, 16 F. (2d) 240 (C. C. A. 9); New York, L. Erie & W. R. Co. v. Winter, 143 U. S. 60, 75, 12 S. Ct. 356, 36 L. Ed. 71.

The judgment is affirmed.

[fol. 516] In United States Circuit Court of Appeals, Second Circuit

Robert Cain, Plaintiff-Appellee,

v.

Alpha Steamship Corporation et al., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed Aug. 27, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be, and it hereby is, affirmed, with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 517] [File endorsement omitted.]

[fol. 518] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 2, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,588. U. S. Circuit Court of Appeals, Second Circuit. Term No. 457. Alpha Steamship Corporation, William H. A. Walker, and Frank Daly, etc., petitioners, vs. Robert Cain. Petition for writ of certiorari and exhibit thereto. Filed October 24, 1929. File No. 34,588.

LE COPY

OCT 24 192
CHARLES ELMORE C
CLE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER & DALY,

Petitioners,

—against—

ROBERT CAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION WITH APPENDIX.

CARVER W. WOLFE,
Counsel for Petitioners,
No. 27 William Street,
Borough of Manhattan,
New York City.

Higgins & Higgins, Inc., Printers, 43 New Chambers St., N. Y.

TABLE OF CONTENTS

	PAGE
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved.	1
Questions Presented	2
Reasons Relied on for the Allowance of the Writ	3
Brief in Support of Petition for Writ of Certiorari	6
Opinions of the Courts Below	6
Jurisdiction	7
Statement of the Case	7
Specifications of Errors	9
Argument—Summary of Argument	10

POINT A.

THE OPINION BELOW IS CONTRARY TO, AND IN CONFLICT WITH PRIOR FEDERAL AND STATE COURT DECISIONS 10, 11

POINT B.

THE OPINION BELOW IMPROPERLY CONSTRUED THE SO-CALLED CORPORAL PUNISHMENT STATUTE, §712, TITLE 46, U. S. C. A., R. S., §4611; DEC. 21, 1898, C. 28, §22, 30 STAT. 761; MAR. 4, 1915, C. 153, §9, 38 STAT. 1167 ..... 10, 19

POINT C.

PAGE

EVEN ASSUMING THE DOCTRINE OF RESPONDEAT SUPERIOR IS APPLICABLE UNDER THE GENERAL MARITIME LAW IN CASES INVOLVING PERSONAL INJURIES, THE CIRCUMSTANCES UNDER WHICH THE ASSAULT OCCURRED ARE SUCH AS TO BRING THE CASE WITHIN THE RULE LAID DOWN IN DAVIS VS. GREEN, 260 U. S. 349.....10, 22

Conclusion 24

Appendix 25

LIST OF AUTHORITIES CITED.

Chelentis vs. Luckenbach, 247 U. S. 372..... 18

Davis vs. Green, 260 U. S. 349.....4, 22, 24

Encarnacion vs. Jamison, 251 N. Y. 218, 1929 A. M. C. 1239..... 4, 15

Gabrielson vs. Waydell, 135 N. Y. 1.....4, 14, 16

General Rucker, The, 35 Fed. 152, D. C. W. D. Tenn., Memphis..... 17

Iroquois, The, 194 U. S. 240..... 14

Newport Packet Company vs. Hill, 122 Fed. 246, C. C. A. 8th..... 17

Osceola, The, 189 U. S. 158.....4, 11, 13, 14, 17, 19

Spencer vs. Kelly, 32 Fed. 838..... 17

Wawalona, The, 1925 A. M. C. 552..... 17

STATUTES.

PAGE

Corporal Punishment Statute, Sec. 712, Title 46, U. S. C., R. S. §4611; December 21, 1898, c. 28, §22, 30 Stat. 761; March 4, 1915, c. 153, §9, 38 Stat. 1167.. 3, 4

Federal Employers' Liability Act, April 22, 1908, 35 Stat. c. 149..... 15

Jurisdiction of U. S. District Courts, Title 28, §41 sub. §1-3, U. S. C., R. S. §563, paragraphs 8 and 9, §629, paragraph 6 7

Merchant Marine Act of June 5th, 1920, 41 Stat. c. 250, U. S. C., Title 46, §688..... 16

SUPREME COURT OF THE UNITED STATES

October Term—1929

No.....

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners, doing business under the firm name and style of WALKER & DALY,
Petitioners,

—against—

ROBERT CAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER & DALY, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

The respondent, a seaman on board the pe-

titioners' American Steamship "ALPHA", obtained a judgment in an action at law in the District Court for the Southern District of New York in the sum of Twelve thousand and 00/100 ($12,000.00) Dollars, for injuries alleged to have been sustained by reason of a willful assault committed by the Second Assistant Engineer of the vessel in a moment of anger as a disciplinary measure arising out of the respondent's dereliction in duty. The case was submitted to the jury on the theory that if the assault was committed in the scope of the assaulting officer's employment, and not as a result of a private brawl, the employer would be liable. The Circuit Court of Appeals in an opinion written by Judge Swan, Judges Manton and Augustus N. Hand concurring, affirmed the judgment.

Questions Presented:

1. Where there is no evidence of breach of the shipowner's duty to protect a seaman from inhuman treatment, no proof of previous vicious character of the assaulting officer, and no ratification of the assault by the shipowner, is the vessel owner liable under the General Maritime Law for indemnity for injury sustained by a seaman resulting from a willful assault of a superior officer other than the master, committed in anger because of the seaman's dereliction from his duty?

2. Is the so-called Corporal Punishment Statute, Sec. 712, Title 46, U. S. C., R. S. §4611; December 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167, exclusively definitive as to the shipowner's liability for a willful assault committed upon seamen by a superior officer other than the master as a disciplinary measure where there is no evidence of breach of the owner's duty to protect seamen from inhuman treatment, no proof of previous vicious character of the assaulting officer, and no ratification of the assault by the owner?

3. Where the evidence shows that an assault was committed upon a seaman by an officer other than the master in anger because of the seaman's dereliction in his duty, can the assault be regarded as having been committed in furtherance of the shipowner's business?

B.

Reasons Relied on for the Allowance of the Writ.

1. This Court has never directly passed on the question of a shipowner's liability for willful assault committed by an officer other than the master upon a member of the crew where there is no evidence of breach of the owner's duty to protect seamen from inhuman treatment,

no proof of previous vicious character of the assaulting officer, and no ratification of the assault by the owner. The Circuit Court of Appeals, although it considered the authorities decided the question as though it were presented *de novo*, but stated in its opinion "that the question is not free from doubt." It is, therefore, vitally important to shipowners and seamen alike, that the opinion below should be reviewed upon by this Court.

2. The opinion of the Circuit Court of Appeals is in conflict with the implications contained in the decision of this Court in *The Osceola*, 189 U. S. 158, and *Davis vs. Green*, 260 U. S. 349. It is also in conflict with *Gabrielson vs. Waydell*, 135 N. Y. 1, and *Encarnacion vs. Jamison*, 251 N. Y. 218, 1929, A. M. C. 1239, in which a petition for a writ of certiorari has been applied for.

3. The application and construction of the Corporal Punishment Statute, §712, Title 46, U. S. C. A., R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167, has not been considered by this Court, particularly as to whether it furnishes an exclusive basis for liability of a shipowner for willful assault committed by one other than the master. The opinion below disregarded its plain meaning.

4. The Circuit Court of Appeals misconstrued the decision of this Court in *Davis vs. Green supra*, and *The Osceola, supra*, concern-

ing the applicability of the rule respondeat superior.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case, and that the said judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem to be just,

AND your petitioners will forever pray.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER AND DALY.

By
CARVER W. WOLFE,
their Solicitor and Counsel.

SUPREME COURT OF THE UNITED STATES

October Term—1929

No.....

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners, doing business under the firm name and style of WALKER & DALY,
Petitioners,

—against—

ROBERT CAIN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, as yet unofficially reported, was handed down on the 19th day of August, 1929. It appears appended to the record and as an Appendix to this brief.

II.

Jurisdiction.

1. Jurisdiction is founded on Title 28, §41, sub. §1-3, U. S. C., R. S. §563, paragraphs 8 and 9, §629, paragraph 6; Mar. 3, 1875, c. 137, §1, 18 Stat. 470; Mar. 3, 1887, c. 373, §1, 24 Stat. 552; Aug. 13, 1888, c. 866, §1, 25 Stat. 433; Mar. 3, 1911, c. 231, §24, paragraph 3, 36 Stat. 1091; Oct. 6, 1917, c. 97, §1, 40 Stat. 395; June 10, 1922, c. 216, §1, 42 Stat. 634.

2. The date of the judgment to be reviewed is August 27th, 1929.

III.

Statement of the Case.

Respondent recovered a judgment in the sum of Twelve thousand and 00/100 ($12,000.00) Dollars, against petitioners in the United States District Court for the Southern District of New York, in an action at law, alleging a willful assault by the Second Assistant Engineer of the petitioners' American Steamship "ALPHA", while said vessel was lying in the navigable waters of the Republic of Venezuela, committed in a moment of anger as a disciplinary measure occasioned by the respondent's lateness in coming

on watch (fols. 11-14). His testimony as to the assault is as follows:

> "He (referring to the Second Assistant) came all the way up and spoke to me and he said 'what to do with you.'
>
> "Q. That means 'What is the matter', is that right? A. I don't know what is the matter with him, I wanted to know what is the matter with the first engineer, the first assistant. That is what I said to him. I said to him, 'I don't know what is the matter with me, what is the matter with the first assistant.' He told me I was a bit late. I says to him 'Yes, I am a bit late, I overslept,' and he said 'Late be damned', and he says to me, and he struck me across the head with a monkey wrench. I fell back like this (indicating) and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him" (fols. 137-140).

There was no proof that the engineer involved had a known or notorious, vicious or brutal character. No evidence was offered to show that the assault was committed in the presence of the master, or with his knowledge, consent or ratification, and no evidence showing any breach of the shipowner's duty of protecting the seamen from inhuman treatment.

The case was submitted to the jury on two

theories, first, liability on the basis of respondeat superior, and, secondly, on the basis of the failure of the shipowner to protect the seaman (fols. 1345-1354). The jury disagreed on the second count (fol. 1416 and following) and respondent's counsel has apparently waived any rights which may arise under the second count. Proper exceptions were taken to Trial Court's denial of motion to dismiss the complaint (fols. 534 and following, 1206).

The Circuit Court of Appeals for the Second Circuit affirmed the judgment, predicating liability of the owner on the doctrine of respondeat superior.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in finding and holding that the respondent was entitled to indemnity as distinguished from maintainence and cure for injuries sustained by willful assault of a superior officer other than the master, under the General Maritime Law.

2. The Circuit Court of Appeals erred in finding and holding that the so-called Corporal Punishment Statute did not exclusively define the liability of a vessel owner for a willful assault committed by a superior officer other than the master upon a seaman.

3. The Circuit Court of Appeals erred in

holding and finding that the assault was committed in the furtherance of the shipowner's business.

V.

ARGUMENT

Summary of Argument.

POINT A.

The opinion below is contrary to, and in conflict with prior Federal and State Court decisions.

POINT B.

The opinion below improperly construed the so-called Corporal Punishment Statute, §712, Title 46, U. S. C. A., R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167.

POINT C.

Even assuming the doctrine of respondeat superior is applicable under the general Maritime Law in cases involving personal injuries, the circumstances under which the assault occurred are such as to bring the case within the rule laid down in Davis vs. Green, 260 U. S. 349.

POINT A.

The opinion below is contrary to, and in conflict with prior Federal and State Court decisions.

The opinion below laid down the general proposition:

> "While we recognize the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business."

The Osceola, 189 U. S. 158, the leading case governing the shipowner's liability for personal injuries to seamen under the General Maritime Law, in the course of its comprehensive discussion of the subject, held with reference to assault:

> "Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable for an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, al-

though it seems an action in admiralty will lie against the master *in personam* for an assault committed upon a passenger or seaman. *The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in General Admiralty Rule 16, declaring that 'in all suits for assaults or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only' " (p. 171).

It laid down the further propositions:

"1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, by both English and American Law, liable for an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship. (*Scarf vs. Metcalf*, 107 N. Y. 211, 13 N. E. 796).

3. That all members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

The Circuit Court of Appeals, considering the effect of *The Osceola* decision, *supra*, held as follows:

"Having thus directed its attention to injuries resulting from assaults, it would seem strange for the Court, had it thought an action *in personam* would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless the propositions laid down in *The Osceola* opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his vessel and her owners in view of the later decision in

The Iroquois, 194 U. S. 240." (Page 31, Appendix.)

Now, it is obvious that *The Osceola, supra,* is not a complete statement of the rights and liabilities of shipowners in all conceivable conditions. But the law laid down in *The Osceola, supra,* is a complete statement of the rights and liabilities of seamen, vessel, and owner for injuries sustained in the navigation of the vessel. For injuries resulting to seamen from a violation of the owner's contractual duty to furnish proper food, medicines, medical treatment, etc., such as in *The Iroquois,* 194 U. S. 240, of course, the owner is liable for indemnity under the General Maritime Law. It is apparent, therefore, that the rules laid down in *The Osceola, supra,* govern the instant case and that an action for indemnity will not lie.

If we assume with the Circuit Court of Appeals that *The Osceola, supra,* is not specifically applicable, the question remains open for consideration to what extent the decision is controlling in respect of the applicability of the doctrine respondeat superior. In the third proposition in *The Osceola,* this Court held that all members of the crew, except perhaps the master, are fellow-servants. If the assaulting engineer and the respondent were fellow-servants, how can the doctrine of respondeat superior apply?

In *Gabrielson vs. Waydell,* 135 N. Y. 1, the Court of Appeals of New York State held that under the General Maritime Law the vessel

owner was not responsible for indemnity for injuries resulting from an assault committed by the master on the ground that the doctrine respondeat superior did not apply. The case is clearly wrong so far as an assault committed by the master is concerned and was so recognized by the Court of Appeals in its latest decision on the subject, *Encarnacion vs. Jamison*, 251 N. Y. 218. In this latter case, however, the Court in discussing its earlier decision held:

> "While it may no longer be regarded as authority for the proposition of general maritime law that the misconduct of the captain of a ship in his care of the seamen under him is a risk assumed by the seamen, for the consequences of which the owners are not responsible, *Gabrielson vs. Waydell*, 67 Fed. 342; *Osceola*, 189 U. S. 158, 175, there remains in it a vestigial remnant of the once all-comprehensive fellow servant rule, which was in its fullest glory in the year 1892, to wit, the rule of non-liability of the employer for assaults committed by a superior employee upon his inferior in the performance of the employer's work. To this extent it may be controlling upon this Court if it remains in harmony with recent legislation on the subject."

It was thereupon concluded that the Federal Employers' Liability Act, April 22, 1908, 35 Stat.

c. 149, made applicable to seamen by the Merchant Marine Act of June 5th, 1920, 41 Stat. c. 250, U. S. C., Title 46, §688, had changed the Maritime Law and that the Act comprehended willful as well as negligent torts. The Court below disagreed with the State Court of Appeals, holding:

> "While the plaintiff's cause of action cannot, in our opinion, be rested upon the *Jones Act*, (compare *Encarnacion vs. Jamison*), which by incorporating the Federal Employers' Liability Act, requires negligence as the foundation of liability, (*Chesapeak and Ohio Ry. Co. vs. Stapleton*, U. S. Sup. Ct. May 27, 1929), the Statutes may appropriately be referred to as showing the legislative tendency already mentioned." (Page 35, Appendix.)

Hence, if the Circuit Court of Appeals is correct holding that the *Jones Act* is not applied to willful torts, then *Gabrielson vs. Waydell, supra*, is still the law in so far as willful assaults by an officer other than the master is concerned and there is no liability for indemnity.

The authorities which were considered by the Circuit Court of Appeals were rightly disregarded by it as having been inadequately considered. On principle, we can find no justification for distinguishing between liability for willful torts and liability for negligent torts. *The*

Osceola definitely set at rest the inharmony of decisions prior to it. The Circuit Court of Appeals has now re-established to a certain extent the pre-existing confusion, in our opinion, *contra* to those propositions laid down in *The Osceola.*

It is significant in considering the instant case on principle, that in none of the early cases appearing prior to *Spencer vs. Kelly,* 32 Fed. 838, was the suit brought against the shipowner. Subsequent to that time only three cases involving an assault committed by one other than the master have come to the attention of the courts. *The General Rucker,* 35 Fed. 152, D. C. W. D., Tenn., Memphis, and *Newport Packet Company vs. Hill,* 122 Fed. 246, C. C. A. 8th, where the owner was held liable, and *The Wawalona,* 1925 A. M. C. 552, where the owner was held not liable. With reference to these three cases, the Circuit Court of Appeals held:

> None of them discuss the possibility of the maritime law having a rule different from the common law, or the possible inconsistency between holding the shipowner for willful torts of a subordinate officer and exempting him for the latter's negligent torts." (Page 37, Appendix.)

Being unable to find satisfactory support for its holding, the Court below was compelled to rely on judicial legislation. It frankly recog-

nized, at least by implication, its decision as such, for it held:

> "The Maritime Law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions, of where loss suffered in the course of a business should fall, should be reflected in the action of the courts though it result in filling pages which history has left blank." (Page 40, Appendix.)

Sociologically this argument is entitled to great weight, but it should not at this late date be permitted to disturb the unanimity of the Maritime Law, except by Act of Congress.

Chelentis vs. Luckenbach, 247 U. S. 372, affords support for the non-applicability of the doctrine of respondeat superior in admiralty. There this Court held the shipowner liable for maintenance and cure only for injuries sustained by the negligence of a subordinate officer, saying:

> "But the Maritime Law imposes upon the shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship." (Page 38, Appendix.)

The Court below considered this as an expres-

sion of the non-applicability of the rule respondeat superior and said:

> "If the Maritime Law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer." (Page 38, Appendix.)

In view of *The Osceola*, we think that the "logically consistent" supposition is preferable, and urge that the shipowner should be liable only for maintenance and cure where there is no breach of the shipowner's duty of good treatment.

POINT B.

The opinion below improperly construed the so-called Corporal Punishment Statute, §712, Title 46, U. S. C. A., R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §8, 38 Stat. 1167.

This Statute provides as follows:

> "712. *Corporal punishment.* Flogging and all other forms of corporal punishment are prohibited on board of any

vessel, and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officer thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years. Whenever any officer other than the master of such vessel shall violate any provision of this section, it shall be the duty of such master to surrender such officer to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or complaint thereof is made within three days after reaching port. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer. (R. S. §4611; Dec. 21, 1898, c. 28, §22, 30 Stat. 761; Mar. 4, 1915, c. 153, §9, 38 Stat. 1167)."

On this feature the opinion of the Court below was:

"The Statute creates a new ground of liability against the master, and the dec-

laration that ship or owner are also liable may have been inserted to preclude the contrary inference which might have been drawn had the master's liability alone been mentioned." (Page 41, Appendix.)

We think this is a strained construction of the Act. If, as the opinion below indicates, the shipowner is already under an existing liability under the doctrine respondeat superior, where an assault is committed by one other than the master, then so much of this Statute as imposes liability on the shipowner is a mere useless gesture. If any speculation as to why Congress inserted a provision making the owner or vessel liable is to be indulged in, it would seem to be the reverse of that drawn by the Circuit Court of Appeals. Certainly the words of the Statute are plain and we think the intention of Congress was to provide a remedy against the owners in view of the previous non-liability under the General Maritime Law. We, therefore, respectfully urge that the Circuit Court of Appeals misconstrued the meaning and effect of the Statute.

POINT C.

Even assuming the doctrine of respondeat superior is applicable under the general Maritime Law in cases involving personal injuries, the circumstances under which the assault occurred are such as to bring the case within the rule laid down in Davis vs. Green, 260 U. S. 349.

The facts in *Davis vs. Green, supra*, taken from the decision of the *Supreme Court of* Mississippi, 125 Miss. 476, are as follows:

Green, the conductor of a train, was in charge of a switch crew, and the engineer was in charge of switching cars from one point in the railroad yard to another point. It was the duty of the conductor to move the switch in the absence of the switchmen. The engineer and the switchman engaged in an altercation as a result of which the switchman left his post. The engineer then proceeded to move his engine along his route and the engineer and conductor engaged in an altercation as to why the conductor had not thrown the switch. The engineer descended from his cab, and, as the Supreme Court of Alabama describes it,

> "with his pistol took his stand in front of the engine and as Green, the conduc-

> tor, and foreman came up accosted him with this remark: 'Why in the hell have you not thrown the switch?' "

The engingeer thereupon shot the conductor. The Supreme Court of Alabama held this act came within the course of the engineer's employment. This Court, speaking through Mr. Justice Holmes in reversing the Supreme Court of Alabama, said:

> "But neither the allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and willful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a willful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies." (pp. 351-352).

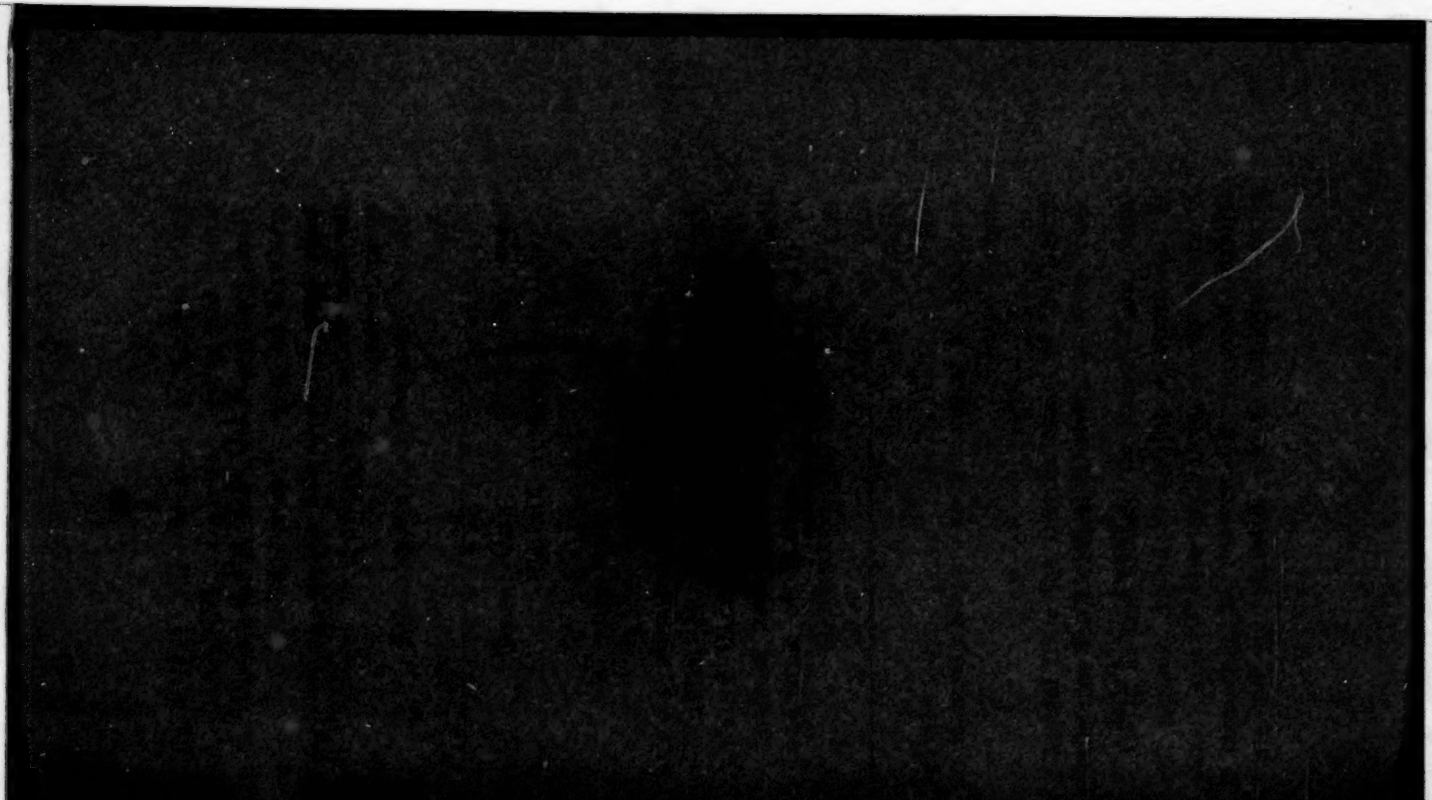
In the instant case, the engineer left his place of employment, the engine room (fols. 219-222), and engaged in an argument over the respond-

ent's coming late on watch, as a result of which the assault occurred. If the assault in *Davis vs. Green* was not in furtherance of the master's business, it seems to us that the assault here was likewise not in furtherance of the master's business. It was as Justice Holmes so aptly remarked: "A willful act wholly outside the scope of his employment while his employment was going on." Hence we respectfully urge that the Court below adopted a mistaken view of the decision.

CONCLUSION

It Is, Therefore Respectfully Submitted that this case is one calling for the exercise by this Court of supervisory powers, in order that the opinion of the Circuit Court of Appeals may be corrected and the unanimity of the Maritime Law restored, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Second Circuit and finally reverse it.

CARVER W. WOLFE,
Counsel for Petitioners.



APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

For the Second Circuit

Robert Cain,
Plaintiff-Appellee,

—against—

Alpha Steamship Corporation, William H. A. Walker and Frank Daly, copartners doing business under the firm name and style of Walker & Daly,
Defendants-Appellants.

Before:

Manton, Swan and Augustus N. Hand,
Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Action at law brought by Robert Cain, plaintiff, against Alpha Steamship Corporation, as owner, and Walker and Daly, as operators of a steamship, to recover for personal injuries sustained by plaintiff while employed as a

fireman on said steamship, by reason of an assault committed upon him by his superior officer, the second assistant engineer. Upon verdict of a jury for the sum of $12,000, judgment was entered for plaintiff, and the defendants have appealed. Affirmed.

HATCH AND WOLFE,
Attorneys for Appellants,
CARVER W. WOLFE,
Of Counsel.

THOMAS J. CUFF,
Attorney for Appellee,
VINE H. SMITH,
Of Counsel.

SWAN, *Circuit Judge:*

This is an action at law for an assault upon a seaman by a subordinate officer, while both were employed upon an American vessel owned by one of the defendants and operated or controlled by the others. It was committed on shipboard when the vessel lay in a Venezuelan port. Jurisdiction of the District Court is founded upon diverse citizenship. The parties have assumed, and rightly so, that the law applicable to this situation is the general maritime law of the United States. See *Roberts vs. Skolfield,* Fed. Cas. No. 11917; *N. Y. Stevedoring Corp. vs. Castagna,* 280 F. 618, 624 (C. C. A. 2); *Chelentis vs. Luckenbach S. S. Co.,* 247 U. S. 372, 384; *Carlisle Packing Co. vs. Sandanger,* 259 U. S. 255, 259; *Northern Coal Co. vs. Strand,*

178 U. S. 142, 144; compare critical articles in 36 Harv. L. Rev. 777; 21 Columbia L. Rev. 645; 55 Am. L. Rev. 685; 53 Am. L. Rev. 749.

The case was left to the jury upon the theory that if Jackson, the second assistant engineer, actually struck fireman Cain, not in the course of a private brawl but in the exercise of his authority over him as his superior officer, the defendants would be liable. This theory the defendants dispute, contending, first, that it misstates the rule of the maritime law, and, second, that even if the law be as stated, the evidence was insufficient to justify a finding that Jackson was acting within the scope of his authority in striking the blows with which he was charged. Both questions were properly saved for review by exceptions to the Court's denial of motions to dismiss the complaint.

The alleged insufficiency of the facts may conveniently be considered first, for, if that be disposed of favorably to the defendants, it will be unnecessary to determine the more difficult question of law. Cain's testimony is that he started to go down to the engine room some forty minutes late for his watch; that on the first landing of the stairway he met the first assistant engineer and became engaged in an altercation with him concerning his tardiness; that he (Cain) retreated to the top of the stairs and from there saw the first assistant engineer talking to Jackson, who was the officer on duty in the engine room; that the latter

thereupon proceeded up the stairway toward him. Cain claims Jackson was drunk. What happened when Jackson reached the top of the stairs Cain relates as follows:

> "He told me I was a bit late. I says to him, 'Yes, I am a bit late, I overslept', and he said, 'Late be damned', and he says to me, and he struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him. * * *"

Jackson pursued him, saying "I will teach you to go down on watch, you bastard." Cain ran to the captain and reported that he had been struck by Jackson. The captain however, says that Cain explained later that his wounds were the result of falling on the deck. This was also Jackson's contention. He denied striking any blow whatever. He says the first assistant told him Cain was drunk; that he thereupon went up the stairs to get another fireman; that Cain had his head in the port engine room door and "I hollered to him to come on down". Cain did not obey and Jackson says that by the time he had reached the top of the stairs Cain had fallen down and was getting to his feet and starting to run away. He admits that he followed Cain along the deck, shouting to him to stop.

Without reciting more of the evidence, it will suffice to say that, assuming the law to be as the Court stated it, the evidence raised issues for the jury. Jackson's duty was to get Cain to work, if he thought Cain was able to work. The jury were entitled to find that he approached Cain for that purpose. He himself says "I hollered to him to come on down". They were also entitled to believe Cain's version of what transpired when the two men met at the top of the stairway. Hence they might infer that Jackson gave the blows for the purpose of compelling Cain's immediate attendance and in connection with reprimanding him for his tardiness. Although excessive violence was used, this is not conclusive that Jackson was not acting in the ship's business. The evidence made it a jury question whether he committed the assault as an officer of the ship in an effort to maintain discipline and obtain a full engine room crew for the watch of which he was in charge, or struck the blows in a private brawl. In *Davis vs. Green*, 260 U. S. 349, a very different situation was presented. There the killing of the conductor resulted from the engineer's personal rancor and was not in furtherance of the employer's business. Here we must accept the jury's verdict as a finding that Jackson's blows were not given in a private brawl but in the exercise of his authority as an officer. Hence we must determine the legal question first mentioned.

The rule of the common law, as established

by the weight of modern authority, imposes liability upon an employer for an assault committed by one of his employees upon another, when the latter is in a position of authority and acts within the general scope and line of his employment. *Encarnacion vs. Jamison*, 251 N. Y. 218; *Richard vs. Amoskeag Mfg. Co.*, 79 N. H. 380; *Fleming vs. Tarboro Knitting Mills*, 161 N. C. 436; *Rogahn vs. Moore Mfg. Co.*, 79 Wis. 573; *Jebeles-Colias Confectionery Co. v. Booze*, 181 Ala. 456; *Mechem, Agency*, 2nd ed., sec. 1960, et seq.; annotation in 18 L. R. A. (N. S.) 416; 7 Harv. L. Rev. 383 (for historical review by Prof. Wigmore). The plaintiff asserts that the same principle obtains in the maritime law. This the defendants deny, their contention being that a seaman's rights are exclusively those stated in *The Osceola*, 189 U. S. 158, namely, wages, maintenance and cure, if the seaman falls sick or is wounded in the service of the ship, regardless of the cause of his wounds, and indemnity for injuries received in consequence of unseaworthiness of the ship, or failure to supply and keep in order proper appliances appurtenant thereto. Admittedly, the propositions laid down in the opinion are much broader than were required by the actual decision, which was that a seaman cannot maintain a libel in rem to recover indemnity for personal injuries caused by the negligence of the master of the vessel. But the dicta were a considered exposition of the maritime law after a careful historical review of British and European rules as well as American.

After referring to the fact that British law grants a seaman indemnity for injuries received through unseaworthiness of the vessel, the opinion states on page 171:

> "Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or *otherwise* in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. *The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in general admiralty rule 16, declaring that 'in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.'"

Having thus directed its attention to injuries resulting from assaults, it would seem strange for the Court, had it thought an action in personam would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless, the propositions laid down in *The Osceola* opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his

vessel and her owners in view of the later decision in *The Iroquois*, 194 U. S. 240. There it was held that for negligent treatment of a seaman after he was injured a right to indemnity existed. Moreover, the appellants concede another exception, namely, the seaman's right to indemnity when the master himself commits the assault. Numerous cases in the lower federal courts, though not with unanimity as to the propriety of a proceeding in rem, have held the ship or her owners liable to indemnify a seaman assaulted by the master, or by another with the master's acquiescence, or by a subordinate of notoriously brutal temper. In the last instance, when the injuries are inflicted by a notoriously brutal officer, liability has been rested upon the duty properly to man the vessel in order to make her seaworthy. *The Rolph*, 299 F. 52 (C. C. A. 8). For cases relating to liability of ship or owner when the assault is committed by the master himself, or by another in his presence, see *The Marion Chilcott*, 95 F. 688 (D. C. N. D. Wash.), *The Lizzie Burrill*, 115 F. 1015 (D. C. Ala.); *The Astral*, 134 F. 1017 (D. C. E. D. Pa.); *The Sallie Ion*, 153 F. 659 (D. C. E. D. Pa.); *The Vueltabajo*, 163 F. 594 (D. C. Ala.); *The David Evans*, 187 F. 775 (C. C. A. 9); *Gabrielson vs. Waydell*, 67 F. 342 (C. C. E. D. N. Y.); *Wolfe vs. Thomas*, 268 F. 464 (C. C. A. 6); see also article in 19 Harv. L. Rev. 418. *Gabrielson vs. Waydell*, 135 N. Y. 1, which held the contrary, is no longer the law of New York. *Encarnacion vs. Jamison, supra.* It is true that this doctrine is of comparatively

recent growth. In *Curtis, Merchant Seaman*, page 339, the learned author says:

> "Whether the shipowner would in any case be liable for the consequential injuries occasioned by excessive punishment of a mariner, by a master, is a point which I have never known to be raised."

On general principles of agency, as they were then understood, he proceeds to argue against liability. Compare, however, the statement, at page 26, that it is part of the obligations implied from the mariner's contract that he "shall be treated with decency and humanity by the master and the officers, and by his shipmates." It is true also that the Supreme Court has never passed upon the question. We believe, however, that the above cases correctly declare the maritime rule that a shipowner is responsible for injuries to a seaman resulting from an unjustifiable assault by the master, or by another with his acquiescence, committed in furtherance of the ship's business. We conclude, therefore, that *The Osceola* cannot be deemed to have laid down a complete statement of an injured seaman's right to indemnity, and that the question of the defendant's liability in the instant case is open to independent consideration.

While conceding that the shipower is bound by an obligation implied from the seaman's contract of employment, to furnish him humane

and decent treatment, the appellants assert that this obligation is violated only when brutality is committed by the master or by another with the master's acquiescence. No case has been cited which extends this theory of liability to the acts of a subordinate officer committed outside the presence of the master. We pass without decision the question whether this theory is necessarily so limited, for it is not upon this theory, but upon the theory of respondeat superior, that the plaintiff relies to sustain his right to recover.

To the theory of respondeat superior the appellants reply that all members of a vessel's crew, except perhaps the master, are fellow servants as between themselves, and that the fellow servant exception to the doctrine of respondeat superior includes willful as well as negligent acts of a fellow employee. The fellow servant defense has almost always been stated as applicable to injuries caused by negligence. Only two cases have been found which discuss its applicability to a willful assault. In *Memphis & Newport Packet Co. vs. Hill*, 122 F. 246 (C. C. A. 8) the contention was rejected. In *Gabrielson vs. Waydell*, 135 N. Y. 1 it prevailed, but as already noted, that case has very recently been overruled, though chiefly upon the ground of subsequent Congressional legislation. *Encarnacion vs. Jamison, supra.* In the absence of compelling authority we see no valid reason to extend the fellow servant exception beyond the field of negligence. Even in its re-

stricted scope it has not escaped criticism, and has by statute frequently been curtailed or abolished. It was abolished in respect to negligent injury of railroad employees engaged in interstate commerce by the Federal Employers' Liability Act (35 Stat. 65), and the benefits of that legislation were by the *Jones Act* extended to seamen who suffer personal injury in the course of their employment (41 Stat. 1007). While the plaintiff's cause of action cannot, in our opinion, be rested upon the *Jones Act* (compare *Encarnacion vs. Jamison*), which by incorporating the Federal Employers' Liability Act requires negligence as the foundation of liability (*Ches. & Oh. Ry. Co. vs. Stapleton*, U. S. Sup. Ct. May 27, 1929), the statutes may appropriately be referred to as showing the legislative tendency already mentioned.

Precise authorities are surprisingly few and unconvincing. *The General Rucker*, 35 F. 152 (D. C. W. D. Tenn.) was a libel in personam against the owner for personal injuries caused by an assault by the mate. The libellant was decreed $100 damages and costs. This case is of little value as a determination of the maritime rule for the Court says (p. 157):

> "It is not at all necessary to consider here the question whether a Court of Admiralty proceeds against the owner of a vessel upon distinct grounds of its own growing out of the peculiar relations that exist as between the owner

and those engaged about navigating a vessel of commerce, in cases like this, or only enforces the ordinary common-law principles of master and servant; for it is conceded by the learned counsel that the defendant is liable on the common law principle, and to that extent certainly; and I find no difficulty in adjudging that this case falls clearly within that principle. * * * But, after all, this case falls, in my judgment, within the Tennessee rule of liability; * * * *"*

Memphis & Newport Packet Co. vs. Hill, 122 F. 246 (C. C. A. 8), affirmed the decree entered for libellant in a libel in personam for an assault committed by a deck hand who had been selected by the officer in command of the vessel to act as captain of the watch. The opinion holds that the fellow servant doctrine has no application to a willful assault by one acting as a subordinate officer; it applies the general principles of agency, and cites with approval *The General Rucker, supra.* There is no consideration of the question whether the maritime rule differs from that of the common law.

The Wawalona, 1925 A. M. C. 552, an oral opinion by Judge Wolverton, appears to hold that the owner is not liable for an assault committed by the chief officer, but that he himself is.

These three cases are the only ones discov-

ered in which a seaman has attempted to hold the shipowner for an assault committed by a subordinate officer without the acquiescence of the master. None of them discuss the possibility of the maritime law having a rule different from the common law, or the possible inconsistency between holding a shipowner for the willful torts of a subordinate officer and exempting him for the latter's negligent torts.

If the exemption of the shipowner from liability, beyond maintenance and cure, in case of negligent injury to a seaman is to be explained on the fellow servant doctrine, as intimated in *The Osceola,* we should have little difficulty in refusing to extend the doctrine to the case of willful torts committed in furtherance of the ship's business. But *Chelentis vs. Luckenbach S. S. Co.,* 247 U. S. 372, seems to suggest that the exemption is based on a much broader principle. That case was an action at law removed from a state court on the ground of diverse citizenship. Plaintiff, a fireman, sought indemnity from the shipowner for injuries caused by negligence of the second engineer. Recovery beyond maintenance and cure was denied. The Court adopted as the applicable substantive law the maritime rule recognized in *The Osceola.* The most significant point for present purposes is the Court's treatment of Section 20 of the Act of March 4, 1915 (38 Stat. 1164) which provided:

"That in a suit to recover damages

for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority."

If the doctrine of respondeat superior were generally applicable to maritime torts this statute would seem to have destroyed the fellow servant defense and to render the vessel owner liable for negligent injuries caused by a subordinate officer. But the Court held the statute irrelevant, saying:

> "But the Maritime Law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence without regard to their relationship. It was of no consequence, therefore, to petitioner whether or not a negligent order came from the fellow servant. The statute is irrelevant."

The implication seems to be that the shipowner's liability does not depend on the rule of respondeat superior but results as an incident of the ownership of the vessel. If the maritime law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer. Certain writers on the subject have

enied that the common law rule of respondeat uperior has received general acceptance in the dmiralty. See 19 Harv. L. Rev. 445; 36 Harv. . Rev. 777. Moreover, the appellants urge, can scarcely be deemed without significance at in all the early cases the assaulted seaman ed only the master or the subordinate officer ho committed the assault. *Roberts vs. Skol-eld*, Fed. Cas. No. 11,917; *Anderson vs. Ross*, ed. Cas. No. 361; *Backstack vs. Banks*, Fed. as. No. 711; *Hanson vs. Fowle*, Fed. Cas. No. 042; *Thomas vs. Lane*, Fed. Cas. No. 13902; *Murray vs. White*, 9 F. 562 (D. C. Me.). *Spencer . Kelly*, 32 F. 838 (C. C. N. D. Oh.) was the rst attempt which has come under our observa-on, to hold the owner liable for an assault the master upon a seaman. It reports the urt's charge to the jury, and, so far as ap-ears, the Court charged according to the com-on law rule without considering whether the aritime rule was different. Judge Brown, in *he City of Alexandria*, 17 F. 390 (D. C. S. D. . Y.) recognized the absence of authority as rong evidence that the maritime law did not mpel payment of indemnity for injuries due negligence. Although absence of authority by no means conclusive, it may properly be emed evidence of the general opinion of the rofession.

While not unmindful of the force of the regoing arguments, we remain unconvinced at the maritime rule differs from that of e common law in respect to the liability of e employer for willful torts committed by

a subordinate officer of a vessel acting within the scope and course of his employment. Admittedly the principle of respondeat superior makes liable the shipowner when the assault is upon a passenger. No reason except the fellow servant doctrine has been advanced for its non-applicability when the assault is upon a seaman, and, as already indicated, that doctrine should not be extended to cover willful torts. We do not believe that the dicta of *The Osceola*, or the implications of the *Chelentis* decision, should be pushed beyond the field of negligence, with which those cases dealt. Nor is the absence of early authorities recognizing the shipowner's obligation, sufficient evidence that no such obligation exists. The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions of where loss suffered in the course of a business should fall, should be reflected in the action of the courts though it result in filling pages with history left blank. Absence of precedent did not preclude recognition by the common law courts of the modern view that a principal should answer for the willful torts of his servant committed in the furtherance of his master's business. The principle is equally applicable to the business of shipping and we find no binding authority which forbids its application in the maritime law. On the contrary, such authority as there is, favors it. In addition to the cases already cited reference

may be made to Hughes, Admiralty, sec. 106, where the author asserts that the owner would be liable "if the assault was made by any of the crew within the course of his employment", and to the views of the author of a scholarly article in 19 Harv. L. Rev. 418. As suggested in the article last mentioned, a law which would excuse the owner when the officer is careful to exercise brutality upon a well seaman, but declares him responsible should the mariner happen to be ill at the time of the assault, could scarcely be deemed satisfactory.

It is urged that the statute which imposes liability upon the master or the ship or her owner in case the master negligently permits the escape of any officer who has inflicted corporal punishment upon a seaman (46 U. S. C. A., sec. 712) indicates that no such liability existed without the statute. To this we cannot accede. The statute creates a new ground of liability against the master, and the declaration that ship or owner are also liable may have been inserted to preclude the contrary inference which might have been drawn had the master's liability alone been mentioned.

While we recognize that the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business. The denial of the motions to dismiss the complaint was, therefore, not error.

Complaint is made because the Court refused to charge that no subordinate officer has au-

thority to administer discipline without express delegation from the master. As an abstract legal proposition this may be true. *United States vs. Taylor*, Fed. Cas. No. 16,442; *Murray vs. White*, 9 F. 562 (D. C. Me.). But if charged in the form requested it would have been likely to mislead the jury into the belief that the defendants could not be held responsible for Jackson's assault, if they should find he committed one. Obviously a blow with a monkey wrench was not a proper way to administer discipline and the jury had in effect been previously so told. Jackson, as Cain's superior officer, had authority to order him on duty or to reprimand him for being late, and if in connection with such an order or such a reprimand he used physical violence for the purpose of forwarding the ship's business, the owner may be held liable. We do not regard as error the refusal of the requested charge.

The claim that the verdict is excessive was presented to the District Court upon a motion for a new trial. There was no abuse of discretion in denying that motion. The amount of the verdict is not for us to review. See *Romdell vs. Goumis*, 228 F. 864 (C. C. A. 2); *Detroit Taxicab & Trans. Co. vs. Pratt*, 2 F. (2d) 193 (C. C. A. 6); *Bowman-Hicks vs. Robinson*, 11 F. (2d) 240 (C. C. A. 9); *Erie R. R. Co. vs. Winter*, 143 U. S. 60, 75.

The judgment is affirmed.

LE COPY

APR 10
CHARLES ELMORE

reme Court of the United States

OCTOBER TERM, 1929

No. 457

A STEAMSHIP CORPORATION, WILLIAM H. A. ALKER and FRANK DALY, copartners doing business der the firm name and style of WALKER & DALY,
Petitioners,

—against—

ROBERT CAIN,
Respondent.

PETITIONERS' BRIEF

CARVER W. WOLFE,
Counsel for Petitioners,
No. 27 William Street,
Borough of Manhattan,
New York City.

Higgins & Higgins, Inc., Printers, 43 New Chambers St., N. Y.

TABLE OF CONTENTS.

PAGE

Statement 1

Pleadings 2

Facts 4

POINT I.

THE COURT BELOW ERRED IN HOLDING THAT THE RESPONDENT WAS ENTITLED TO INDEMNITY FOR INJURIES RESULTING FROM AN ASSAULT COMMITTED BY A SUPERIOR OFFICER OTHER THAN THE MASTER, WHERE THERE WAS NO EVIDENCE OF ANY BREACH OF THE OWNER'S DUTY OF GOOD TREATMENT AND NO RATIFICATION OF THE ASSAULT, UNDER THE GENERAL MARITIME LAW OF THE UNITED STATES..... 7

POINT II.

THE OPINION BELOW IMPROPERLY CONSTRUED THE SO-CALLED CORPORAL PUNISHMENT STATUTE. TITLE 46, SECTION 712, U. S. C. A., R. S., SEC. 4611; DEC. 21, 1898, CHAP. 28, SEC. 22, 30 STAT. 761; MARCH 4, 1915, CHAP. 153, SEC. 9, 38 STAT. 1167..... 31

POINT III.

PAGE

EVEN ASSUMING THE DOCTRINE OF RESPONDEAT SUPERIOR IS APPLICABLE UNDER THE GENERAL MARITIME LAW IN CASES INVOLVING PERSONAL INJURIES, THE CIRCUMSTANCES UNDER WHICH THE ASSAULT OCCURRED ARE SUCH AS TO BRING THE FACTS WITHIN THE RULE LAID DOWN IN DAVIS VS. GREEN, 260 U. S. 349 35

CONCLUSION.

THE JUDGMENT SHOULD BE REVERSED AND THE COMPLAINT DISMISSED 37

Appendix—Digest of Federal Cases Involving Assaults 39

LIST OF AUTHORITIES CITED.

A. Heaton, The, 43 Fed. 592 9

Arnold on Marine Insurance (11th Ed.) 938 18

Blakely, The, 234 Fed. 959 33

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 66 L. Ed. 927 ..... 10, 18

Chandos, The, 4 Fed. 645 9

PAGE

Chelentis vs. Luckenbach S. S. Co., 247 U. S. 372, 62 L. Ed. 1171...8, 10, 11, 15, 18, 21, 22
City of Alexandria, 17 Fed. 390.....9, 18, 19
Collins vs. Wheeler, 1 Sprague (D. C.) 188) 18
Crouch vs. Steel, 3 E. & B. 402..... 18
Curtis "Rights & Duties of Merchant Seamen" pages 19-28 and 1 Kay on "Shipmasters & Seamen" 574, 575..... 19
Cuzco, The, 154 Fed. 177 (C. C. A. 2nd)..... 19
Cyrus, The, 2 Pet. Adm. 407 (D. C.)..... 18

Davis vs. Green, 260 U. S. 349.....35, 37

Eva B. Hall, The, 114 Fed. 755 (S. D. N. Y., 1902) 19

Fein vs. U. S., 1925, A. M. C., 552.....26, 30

Gabrielson vs. Waydell, 67 Fed. 342 (C. C. E. D. N. Y., 1895) 19, 24
General Rucker, The, 35 Fed. 152.....16, 19, 25, 26

Halversen vs. Nisen, 3 Sawy. 562, Fed. Cas. 5970 21
Hanse Towns, Laws of, Art. XXXIX, XLV.. 9
Holland vs. Seventy Five Tons of Coal, 36 Fed. 785 (D. C.) 18

Inez M. Jamison, et al: vs. Valentin Encarnacion. No. 390 7
Iroquois, The, 194 U. S. 240, 48 L. Ed. 955 .....19, 25

PAGE

Julia Fowler, The, 49 Fed. 277 9

Lizzie Burrill, The, 115 Fed. 1015 (D. C. Ala., 1902) 19
Lottawanna, The, 21 Wall. 576, 22 I. Ed. 662 17

Marine Ordinances of Louis XIV, Bk. 3, Title 4, Art. XI 9
Memphis & Newport Packet Co. vs. Hill, 122 Fed. 246 .....16, 19, 25, 26, 27

Oleron, Laws of, Art VI, VII..... 9
Osceola, The, 189 U. S. 158, 47 L. Ed. 760 .....9, 10, 11, 18, 20, 22, 25, 30

Philadelphia and R. R. Co. vs. Derby, 14 How. 688 15
Priestly vs. Fowler, 3 M. & W. 1..... 21

Railroad Co. vs. Derby, 14 How. 468..... 27
Rence, The, 46 Fed. 805 18
Ringgold vs. Crocker, Fed. Cas. 11843..... 26
Rio de Janiero, 130 Fed. 76 (C. C. A. 9th) 18
Rolph, The, 299 Fed. 52 (C. C. A. 9th).....18, 19

Southern Pacific vs. Jensen, 244 U. S. 205, 61 L. Ed. 1086 8
Spencer vs. Kelley, 32 Fed. 838..... 26

Troop, The, 118 Fed. 769 (D. C. W. D. Wash., 1902) 19

PAGE

Walker vs. Maitland, 3 B. & Ald. 170..... 18
Visbuy, Laws of, Art. XVIII, XIX..... 9

STATUTES.

Act of March 4th, 1915, Section 20, 38 Stat. 1164 11

Corporal Punishment Statute, Title 46, Sec. 712, U. S. C. A., R. S. Sec. 4611; December 21, 1898, Chap. 28, Sec. 22, 30 Stat. 761; March 4, 1915, Chap. 153, Sec. 9, 38 Stat. 1167..... 31

Jones Act, (Merchant Marine Act of June 5th, 1920, 41 Stat. Chap. 250, U. S. C. A., Title 46, Sec. 688)..... 6, 19

INDEX OF APPENDIX.

Anderson vs. Ross, 2 Sawy. 91 Fed. Cas. No. 361 39
Astral, The, 134 Fed. 1017, (E. D. Penn., 1905) 59

Backstack vs. Banks, Fed. Cas. No. 711..... 39
Belyea vs. Cook, 162 Fed. 180, (D. C., N. D. California, 1908) 61

PAGE

Butler vs. McClellen, Fed. Cas. 2242, 1 War. 219 39

Cole vs. Tollison, et al., 40 Fed. 303, (D. C. South Carolina, 1889) 46
Cuzco, The, 154 Fed. 177 (C. C. A. 2nd, 1907) 53

David Evans, The, 187 Fed. 775 (C. C. A. 9th, 1911) 62
Dorrell vs. Schwerman, 111 Fed. 209, (D. C. Wisconsin, 1901) 52

Eva B. Hall, The, 114 Fed. 755, (S. D., N. Y. 1902) 52

Fein vs. United States, 1925 A. M. C., 552 (D. C. Oregon, 1925) 66
Foye vs. Lecki, Fed. Cas. 5023; 1 Spr. 210 40

Gabrielson vs. Waydell, 67 Fed. 342 (E. D., N. Y. 1895) 47
Gardiner vs. Bibbins, et al., Fed. Cas. 5222 40
General Rucker, The, 35 Fed. 152, (D. C. Tennessee, 1888) 45
Hansen vs. Fowle, Fed. Cas. No. 6042 ..... 40, 43

Johnson vs. Mowatt, 115 Fed. 844, (E. D. Pennsylvania, 1902) 54

Lizzie Burrill, The, 115 Fed. 1015, (D. C. Alabama, 1902) 53

PAGE

Marion Chilcott, The, 95 Fed. 688, (N. D., Washington, 1899) 50
Mellor vs. Cox, 45 Fed. 115, (D. C. South Carolina, 1891) 47
Memphis Packet Co. vs. Hill, 122 Fed. 246, (C. C. A., 8th, 1903) 46, 55, 58
Miami, The, 78 Fed. 818 (D. C. S. D. Alabama, 1896) 49
Morris vs. Cornell, Fed. Cas. 9829, 1 Spr. 62 40
Murray vs. White, et al., 9 Fed. 562 (D. C. Maine, 1881) 43

Osceola, The, 189 U. S. 158, 47 L. Ed. 760 ..... 58, 59, 60, 66
Olsen vs. Oregon Coal & Navigation Co., 96 Fed. 109 (aff'd 104 Fed. 574), (C. C. A. 9th, 1900) 51

Padmore vs. Piltz, 44 Fed. 104, (D. C., Washington, 1890) 47
Payne vs. Allen, Fed. Cas. 10855, 1 Spr. 304 40
Perriam vs. Pac. Cast. Co., 133 Fed. 140 (C. C. A. 9th, 1904) 59

Railroad Co. vs. Conroy, 175 U. S. 323 49
Railway Co. vs. Ross, 112 U. S. 377 49
Riley vs. Allen, 23 Fed. 46, (D. C. Tennessee, 1885) 43
Ringgold vs. Crocker, Fed. Cas. 11843; 1 Abb. Adm. 344 40
Rolph, The, 293 Fed. 269, aff'd. 399 Fed. 52 (C. C. A. 8th, 1925) 63

PAGE

Sallie Ion, The, 153 Fed. 659, (E. D. Penn., 1907) 60

Schooner Robinson, 1925, A. M. C. 684 (E. D. Pa., 1925) 64

Sheridan vs. Furber, Fed. Cas. No. 12761.... 41

South Portland, The, 111 Fed. 767, (D. C. Washington, N. D. 1901) 52

Spencer vs. Kelley, 32 Fed. 838 (C. C. Ohio, 1887) 43

Thomas vs. Lane, Fed. Cas. 13902..... 41

Vueltajabo, The, 163 Fed. 594, (D. C. Alabama, 1908) 46, 61

Wolfe vs. Thomas, 268 Fed. 464, (C .C. A. 6th, 1920) 62

SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. 457.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of WALKER & DALY,
Petitioners,

—against—

ROBERT CAIN,
Respondent.

PETITIONERS' BRIEF

Statement

On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review judgment affirming judgment of the United States District Court for the Southern District of New York, in favor of the plaintiff,

in an action brought to recover damages for personal injuries.

This is an action at law, brought by the respondent, a fireman on board the American Steamer "ALPHA", owned and operated by petitioners, to recover damages for injuries resulting from an assault alleged to have been committed upon him by the Second Assistant Engineer of the vessel on the morning of February 5th, 1927, while the vessel was lying at Port Amuey, Venezuela. The trial resulted in a judgment for the respondent in the sum of $12,000, which was affirmed by the Circuit Court of Appeals. The opinion of the Circuit Court of Appeals is reported in 35 Fed. (2nd) 717.

This Court granted a writ of certiorari to review this judgment, on December 2nd, 1929.

Pleadings

The complaint contains six causes of action, of which, all but the first and second were dismissed by the Trial Judge and are not here involved. The material allegations of the first cause of action are:

> "*Sixth*: That at the times hereinafter mentioned, one Jackson was in the employ of the defendants as an officer of the said vessel, to wit, the Second As-

sistant Engineer, and that the said Jackson, as such officer, had jurisdiction and authority from the defendants to maintain discipline upon the said vessel, and that he, as such officer, had immediate jurisdiction and authority over the plaintiff.

"*Seventh*: That on or about the 6th day of February, 1927, while the said vessel was in navigable waters in the Republic of Venezuela, South America, the said Jackson, without cause or provocation, violently struck and assaulted the plaintiff, and deliberately and with great force struck plaintiff twice upon the head with a wrench or pipe or other metal instrument, whereby the plaintiff sustained injuries hereinafter set forth.

"*Eighth*: That the act of the said Jackson was done in the exercise of the authority delegated to him by the defendants as aforesaid and was within the scope of his employment and in the course of his duties as said officer of the vessel and for the purpose of enforcing and maintaining the discipline of the vessel; and that the said Jackson was required by the defendants, among his other duties as said officer, to maintain discipline upon said vessel" (2).

The material allegation of the second cause of action is as follows:

"*Twelfth*: That the plaintiff's said injuries were caused by reason of the carelessness and negligence of the defendants in failing to protect the plaintiff from assault by the said Jackson and in failing to exercise care and diligence in preventing such assault although the defendants had knowledge of all the circumstances in ample time so to do" (3).

The answers deny these allegations (6, 7).

The jury disagreed as to the second cause of action (341).

Motion for a new trial was denied in a written opinion by Judge Mack, appearing at page 10 of the Record.

Facts

In view of the finding of the jury, there are no disputed questions of fact involved in this hearing. We quote the facts from the opinion of the Circuit Court of Appeals:

"Cain's testimony is that he started to go down to the engineroom some forty minutes late for his watch; that on the first landing of the stairway he met the first assistant engineer, and became engaged in an altercation with him concerning his tardiness; that he (Cain) retreated to the top of the stairs, and

from there saw the first assistant engineer talk to Jackson, who was the officer on duty in the engineroom; that the latter thereupon proceeded up the stairway toward him. Cain claims Jackson was drunk. What happened when Jackson reached the top of the stairs Cain relates as follows:

"'He told me I was a bit late. I says to him, Yes, I am a bit late, I overslept; and he said, Late be damned; and he says to me and he struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck, and then I got up and I run on my hands and knees away from him * * *.'

"Jackson pursued him, saying, 'I will teach you to go down on watch, you bastard.' Cain ran to the captain and reported that he had been struck by Jackson. The captain, however, says that Cain explained later that his wounds were the result of falling on the deck. This was also Jackson's contention. He denied striking any blow whatever. He says the first assistant told him Cain was drunk; that he thereupon went up the stairs to get another fireman; that Cain had his head in the port engine-

> room door, and 'I hollered to him to come on down.' Cain did not obey, and Jackson says that by the time he had reached the top of the stairs, Cain had fallen down and was getting to his feet and starting to run away. He admits that he followed Cain along the deck, shouting to him to stop'' (357).

The case was left to the jury upon the theory that if the second assistant engineer actually struck Cain, not in the course of a private brawl but in the exercise of his authority over him as a superior officer, the defendants would be liable (327).

At the end of plaintiff's case, and again at the end of the defendants' case, proper motions were made to dismiss the complaint, and exceptions taken on the denial of the motions (126, 130, 292).

There was no evidence of any breach of the shipowner's duty to protect the seaman from inhuman treatment, no proof of the previous vicious or notorious character of Jackson, the assaulting officer, and no proof of ratification of the assault by the defendants or the master of the vessel.

This brief will not deal with the question of liability under the so-called Jones Act (Merchant Marine Act of June 5, 1920, 41 Stat. chap. 250, U. S. C. A. Title 46, Sec. 688) as the Circuit Court of Appeals has held the Jones

Act not applicable, and as the specific point is to be determined by this Court in the case of *Inez M. Jamison, et al vs. Valentin Encarnacion*, No. 390, which is to be argued this term.

POINT I.

The Court below erred in holding that the respondent was entitled to indemnity for injuries resulting from an assault committed by a superior officer other than the master, where there was no evidence of any breach of the owner's duty of good treatment and no ratification of the assault, under the General Maritime Law of the United States.

This case presents for determination by this Court, for the first time, the question whether under the general maritime law a vessel owner is liable for indemnity to a seaman for injuries flowing from an assault committed by an officer other than the master, where there is no evidence of the assaulting officer's previous brutal character, no violation of the owner's contractual duty of good treatment, and no evidence of ratification by the master or owner.

The cases below are in conflict, and except for the decision in the instant case, there is no considered review of the subject of the lower

courts. Judge Swan, writing for the Circuit Court of Appeals, referred to such authorities as there are in the following language:

> "Precise authorities are surprisingly few and unconvincing" (362).

but after full consideration held the petitioners liable under the rule *"respondeat superior"*. The learned Judge concluded:

> "While we recognize that the question is not free from doubt, we hold that the shipowner is liable for the willful assault of a subordinate officer acting as such in the ship's business" (365).

As liability was specifically predicated on the rule *"respondeat superior"*, it is necessary to inquire into the extent to which this doctrine applies in the general maritime law of this country in this class of cases. Petitioner contends that whatever the basis of liability for indemnity may be, in cases of injury to seamen, it is not *"respondeat superior"*, although some of the early cases would seem to so indicate.

While many of the lower courts sought to make the injured seaman's rights amphibious, here grounding them on common law doctrines, there anchoring them in the maritime law, it was not until the *Southern Pacific vs. Jensen*, 244 U. S. 205, 61 L. Ed. 1086; and *Chelentis vs. Luckenbach S. S. Co.*, 247 U. S. 372, 62 L.

Ed. 1171; that the exclusive character of the maritime law was finally recognized, and accepted as the sole source of the injured mariner's rights, irrespective of the forum where the suit might be brought. Hence, the early cases such as *The A. Heaton*, 43 Fed. 592; *The Chandos*, 4 Fed. 645; *The Julia Fowler*, 49 Fed. 277, in which liability was based upon common law principles, are now completely discredited. The sole question is whether the *maritime* law imposes liability on shipowners for injuries to seamen by reason of the rule *"respondeat superior"*.

From the earliest times, the injured seaman was entitled in case of illness or injury only to his maintenance and cure, except where the injury resulted from the mariner's own willful misconduct. The fault of the owner or his servants was immaterial as was the negligence of the injured person.

Laws of Oleron, Art. VI, VII;

Laws of Wisbuy, Art. XVIII, XIX;

Laws of Hanse Towns, Art. XXXIX, XLV;

Marine Ordinances of Louis XIV, Bk. 3, Title 4, Art. XI;

City of Alexandria, 17 Fed. 390;

The Osceola, 189 U. S. 158, 47 L. Ed. 760;

Chelentis vs. Luckenbach S. S. Co., supra;

Carlisle Packing Co. vs. Sandanger, 259 U. S. 255, 66 L. Ed. 927.

Under the early codes no indemnity was allowed. In view of the fact that the fault of shipowner and the injured seaman was immaterial, it is obvious that liability of the shipowner was not fixed by the rule of *respondeat superior.*

The allowance of indemnity is an exception to the general rule allowing maintenance and cure, and was so recognized by this Court in *The Osceola, supra.* In that case Mr. Justice Brown stated:

> "It will be observed in these cases that a departure has been made from the continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants Shipping Act of 1876, above quoted, (*Couch vs. Steel,* 3 El. & Bl. 402; *Hedley vs. Pinkney & Sons S. S. Co.,* 7 Asp. M. L. Cas. 135 (1894) A. C. 222) and in this country in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering in-

jury through the unseaworthiness of the vessel" (p. 175).

The learned Justice also recognized that the basis of liability for indemnity arising through injury caused by unseaworthiness of the vessel was not *"respondeat superior"*, but was based on the violation of the owner's contractual duty. He states:

> "Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the Merchants' Shipping Act of 1876 (39 & 40 Vict., Chap. 80, Sec. 5), wherein, in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage." (P. 171.)

The implication in *The Osceola, supra,* was crystallized into a direct statement in *Chelentis vs. Luckenbach S. S. Co., supra.* There the injured seaman brought an action at law to recover indemnity for injuries sustained in consequence of the negligence of the second assistant engineer. Recovery was sought under Section 20 of the *Act of March 4th, 1915,* 38 Stat. 1164, providing:

> "That in any suit to recover damages

> for any injuries sustained on board a vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

This Court in denying indemnity laid down the following rule:

> "But the maritime law imposes upon the shipowner liability to a member of the crew injured at sea by reason of another member's negligence, *without regard to their relationship;* it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow-servant; the statute is irrelevant" (384). (Italics ours.)

From this it is clear that "*respondeat superior*" is definitely repudiated as a basis for liability in the maritime law.

It is equally clear that denial of liability beyond maintenance and cure was not postulated on the fellow-servant rule. This latter feature of the opinion was entirely overlooked by the Court below. The purpose of the statute was, of course, to do away with the fellow-servant rule, and had the fellow-servant rule obtained in the maritime law, the statute would unquestionably have accomplished its purpose. But this Court directly negatived its applicability, both as to maintenance and cure and indemnity.

The lower court dealt with this decision in the following language:

"The implication seems to be that the shipowner's liability does not depend on the rule of respondeat superior, but results as an incident of the ownership of the vessel. If the maritime law does not recognize the principle of respondeat superior as applied to negligent acts of a subordinate officer, it is logically consistent to suppose that it does not recognize it as applied to the willful assaults of such an officer. Certain writers on the subject have denied that the common law rule of respondeat superior has received general acceptance in the admiralty. See 19 Harv. Law Rev. 445; 36 Harv. Law Rev. 777. Moreover, the appellants urge, it can scarcely be deemed without significance that in all the early cases the assaulted seaman sued only the master or the subordinate officer who committed the assault. * * *

"While not unmindful of the force of the foregoing arguments, we remain unconvinced that the maritime rule differs from that of the common law in respect to the liability of the employer for willful torts committed by a subordinate officer of a vessel acting within the scope and course of his employment. Admittedly, the principle of respondeat

> superior makes liable the shipowner when the assault is upon a passenger. No reason except the fellow servant doctrine has been advanced for its non-applicability when the assault is upon a seaman, and, as already indicated, that doctrine should not be extended to cover willful torts. We do not believe that the dicta of *The Osceola*, or the implications of the *Chelentis* decision, should be pushed beyond the field of negligence, with which those cases dealt." (pp. 363, 364).

The error which the lower court committed was in assuming that respondeat superior was the basis for liability, and that, in cases, other than those in which the injury was due to unseaworthiness, non-liability for indemnity was due to the fellow-servant rule. We submit that this is an entirely fallacious analysis of the law. *"Respondeat superior"* is not the basis of liability in unseaworthiness cases, the liability there being based on breach of contract, and the non-liability of the shipowner, where the injury was due to negligence of a fellow-seaman, is not a result of the fellow-servant rule *but of the total absence of any principle in the maritime law allowing indemnity in such cases.* The passenger cases, of course, rest on a different basis. We shall advert to the fellow-servant rule *infra.*

If the rule *"respondeat superior"* is applicable at all, it is applicable both to negligence

cases and to willful torts. In *Philadelphia and R. R. Co. vs. Derby*, 14 How. 688, this Court in a common law action for personal injuries, held:

> "The rule 'respondeat superior' or, that the master shall be civilly liable for the tortious acts of his servants, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servants' act or neglect, or if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servants' employment." (P. 486.)

The Circuit Court of Appeals apparently overlooked the full force of this statement. If the *Chelentis* case is correct in holding that "*respondeat superior*" is not applicable in negligence actions as a basis for indemnity, what authority is there, in the maritime law, in view of the statement laid down in *Philadelphia & R. R. Co. vs. Derby*, for holding it applicable in cases of willful torts? It is submitted that there can be no valid line of distinction between the two classes of cases; if applicable in one, it is equally applicable in the other. It would be a most unsatisfactory and illogical law which refused to apply

"respondeat superior" to negligence actions but did apply it to willful acts.

The researches of counsel have been unable to find a single case prior to *The General Rucker*, 35 Fed. 152, where the shipowner was held liable for indemnity for an assault committed by one other than the master. Subsequent to that case there is only one other case holding the shipowner liable under these circumstances, *Memphis & Newport Packet Co. vs. Hill*, 122 Fed. 246. This of itself is evidence of the strongest character that no such liability exists.

The Court, realizing the difficulties of its position, particularly the inconsistency of holding the shipowner liable for a willful assault committed by one other than the master, and yet denying recovery under similar circumstances where the injury was due to negligence, attempted to justify itself by resorting to a sociological appeal. The Court held:

> "Nor is the absence of early authorities recognizing the shipowner's obligation, sufficient evidence that no such obligation exists. The maritime law, no less than the common law, is not incapable of growth by judicial decision. Changes in conditions under which commercial shipping is conducted, as well as changes in economic notions of where loss suffered in the course of a business should fall, should be reflected in the action of the courts, though it result in

> filling pages which history left blank. Absence of precedent did not preclude recognition by the common law courts of the modern view that a principal should answer for the willful torts of his servant committed in the furtherance of his master's business. The principle is equally applicable to the business of shipping, and we find no binding authorities which forbids its application in the maritime law. On the contrary such authority as there is favors it." (pp. 364, 365.)

This appeal to changing economic conditions as a justification for judicial legislation is sociologically moving, but legally unsound. It is the sole function of the Court to declare the law, and not to make it. (*The Lottawanna,* 21 Wall. 576, 22 I. Ed. 662). If the law is unsatisfactory and does not conform with present day ideas of social justice, that is a matter for the conscience of the Legislature.

We contend that the authorities and textbook writers support the following general statement with respect to the liability of shipowners for injuries to seaman.

For violation of any express or implied contractual duties, the injured seaman, under the maritime law, may recover indemnity. The ordinary implied duties of the owner are:

> (1) To furnish a seaworthy vessel and to supply and keep in order the

proper appliances appurtenant to the ship.

The Osceola, supra;

Chelentis vs. Luckenbach S. S. Co., supra;

Carlisle Packing Co., vs. Sandanger, supra.

This includes the obligation (a) to furnish reasonably competent co-employees;

City of Alexandria, supra;

Rio de Janeiro, 130 Fed. 76 (C. C. A. 9th);

The Rolph, 299 Fed. 52, (C. C. A. 9th);

Walker vs. Maitland, 3 B. & Ald. 170;

Holland vs. Seventy Five Tons of Coal, 36 Fed. 785 (D. C.);

Arnold on Marine Insurance (11th Ed.) 938;

(b) to comply with statutory duties as to food, medicines and anti-scorbutics.

The Cyrus, 2 Pet. Adm. 407 (D. C.);

Crouch vs. Steel, 3 E. & B. 402;

Collins vs. Wheeler, 1 Sprague (D. C.) 188;

The Rence, 46 Fed. 805.

(2) To furnish proper maintenance and cure after injury.

The Iroquois, 194 U. S. 240, 48 L. Ed. 955;

The Troop, 118 Fed. 769 (D. C. W. D. Wash. 1902);

Gabrielson vs. Waydell, 67 Fed. 342 (C. C. E. D. N. Y. 1895) reversed on other grounds, 76 Fed. 380;

City of Alexandria, supra.

(3) To protect seamen against indecent and inhuman treatment.

The Eva B. Hall, 114 Fed. 755 (S. D. N. Y. 1902);

The Cuzco, 154 Fed. 177 (C. C. A. 2nd);

The Lizzie Burrill, 115 Fed. 1015 (D. C. Ala. 1902);

The Rolph, supra.

See also Curtis "Rights & Duties of Merchant Seamen", pages 19-28, and 1 Kay on "Shipmasters & Seamen," 574, 575.

Beyond these, we find no authority in the maritime law (aside from the Jones Act) awarding injured seamen indemnity, except as laid down in *The General Rucker, supra* and *Memphis & Newport Packet Co. vs. Hill, supra,* to which we shall advert later.

The error into which the Court below fell, consisted in failing to realize the true basis

for the allowance of indemnity. In *The Osceola*, this Court, after a considered review of the law relating to liability for injuries to seamen, held, p. 175:

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled on the following propositions:
>
> "1. That the vessel and her owners are liable in case a seaman falls sick or is wounded in the service of the ship, to the extent of his maintenance and cure, and to his wage, at least so long as the voyage is continued.
>
> "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff vs. Metcalf*, 107 N. Y. 211, 13 N. E. 796.
>
> "3. That all members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the

negligence of another member of the crew, beyond the expense of his maintenance and cure.

"4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

Petitioner maintains that these propositions are sufficient to establish the non-liability of the shipowner in the instant case beyond maintenance and cure.

Propositions 1 and 4 state the general rule. Proposition 2 states the exception to the rule. In neither is there any indication whatsoever that *"respondeat superior"* is the basis of liability. In fact, a careful reading of the case shows the reverse.

It is unfortunate that Proposition 3 was inserted in the opinion. It is entirely unnecessary and is pure dictum. As we have shown, the *Chelentis* case completely negatives the application of the fellow-servant rule in admiralty. Long before the fellow-servant rule was evolved, the admiralty courts were satisfactorily deciding cases involving injuries to mariners. The rule originated in England in the common law case of *Priestly vs. Fowler*, 3 M. & W. 1, and was not injected into the maritime law of this country until the case of *Halversen vs. Nisen*,

3 Sawy. 562, Fed. Cas. 5970, and there only common law authorities were cited in support of its application. Its attempted introduction was entirely gratuitous, and served only to confuse the real principles involved. If, as laid down in the *Chelentis* case, the basis of liability is not *"respondeat superior"*, then the fellow-servant rule can have no place in maritime jurisprudence. Petitioner urges that this Court should expressly repudiate the dictum contained in Proposition 3 of *The Osceola* and should take this opportunity of formulating a re-statement in this connection, for the guidance and benefit of the American maritime interests.

Although the opinion in *The Osceola* discusses the question of liability for assault, it is significant that it includes only the liability of the master and not that of the owner. On this point the opinion states:

> "Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence *or otherwise* in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master in personam for an assault committed upon a passenger or seaman. *The Aggincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in General Ad-

miralty Rule 16. * * *" (Italics ours.)

The Court below in commenting on this held:

"Having thus directed its attention to injuries resulting from assaults, it would seem strange for the Court, had it thought an action in personam would lie against the owners, to have ignored this remedy and to have specified only that against the master. Nevertheless, the propositions laid down in *The Osceola* opinion cannot be deemed an absolutely complete statement of an injured seaman's rights against his vessel and her owners, in view of the later decision in *The Iroquois*, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955. There it was held that for negligent treatment of a seaman after he was injured a right to indemnity existed. Moreover, the appellants concede another exception, namely, the seaman's right to indemnity when the master himself commits the assault. Numerous cases in the lower Federal Courts, though not with unanimity as to the propriety of a proceeding in rem, have held the ship or her owners liable to indemnify a seaman assaulted by the master, or by another with the master's acquiescence, or by a subordinate of notoriously brutal temper. In the last instance, when the injuries are inflicted by a notoriously brutal officer, liability

> has been rested upon the duty properly to man the vessel in order to make her seaworthy. • • • We believe, however, that the above cases correctly declare the maritime rule that a shipowner is responsible for injuries to a seaman resulting from an unjustifiable assault by the master, or by another with his acquiesence, committed in furtherance of the ship's business. We conclude, therefore, that *The Osceola* cannot be deemed to have laid down a complete statement of an injured seaman's right to indemnity, and that the question of the defendants' liability in the instant case is open to independent consideration."

Of course, where an unjustified assault is committed by the master, or by another at his direction or with his sanction, the owner is liable for indemnity, for the reason that the master, who is the owner's representative for the furnishing of decent, humane treatment, has violated this contractual duty. *Gabrielson vs. Waydell, supra.* But the basis of the liability is the violation of a contractual duty imposed on the owner by the maritime law and not *"respondeat superior"*. Subordinate officers, however, are not the owner's representatives for the purpose of providing the seaman with decent and humane treatment. Hence, an unjustified assault by one other than the master, where the master was not a party to the assault and could not prevent it, does

not give rise to liability on the theory of a violation of the owner's contractual duty. *The Iroquois*, to which the lower court adverted, was likewise not based on matters connected with the navigation and management of the vessel, but again was concerned with liability arising out of the contractual obligation of the shipowner. The Court below did not allude to any other maritime decisions, except *The General Rucker* and *Memphis & Newport Packet Co. vs. Hill*, where a different rule was laid down than that contained in *The Osceola*. We, therefore, urge that the Court below failed to distinguish between the different grounds of liability, and erred in failing to hold that *The Osceola* governed the case. There are numerous instances where the seaman may recover indemnity for violation of the contractual obligation, and we do not contend that *The Osceola*, as to these matters, is exclusive.

Furthermore, the Circuit Court of Appeals recognized that:

> "No case has been cited which extends this theory of liability to the acts of a subordinate officer committed outside the presence of the master. We pass without decision the question whether this theory is necessarily so limited, for it is not upon this theory but upon the theory of respondeat superior, that the plaintiff relies to sustain his right to recover." (p. 361.)

We now turn to the discussion of the cases

involving actual assault. From Appendix "A", which is a complete list of Federal decisions, so far as we have been able to compile them, covering suits for assaults, it appears that prior to *Spencer vs. Kelley*, 32 Fed. 838, with the exception of *Ringgold vs. Crocker*, Fed. Cas. 11843, the suit was always brought against the master or the assaulting officer. This is some indication that the maritime bar were not of opinion that the owner was liable. Subsequent to this case we have only found three cases where no violation of the owner's contractual duty of good treatment was involved. They are *The General Rucker, supra; Memphis & Newport Packet Co. vs. Hill, supra; Fein vs. U. S.*, 1925 A. M. C. 552.

In *The General Rucker, supra,* the question was whether the vessel owner was liable for an assault committed by the mate upon a roustabout. The Court held:

> "It is not at all necessary to consider here the question of whether a court of admiralty proceeds against the owner of a vessel upon distinct grounds of its own growing out of the peculiar relation that exists between the owner and those engaged about navigating a vessel of commerce, in cases like this, or only enforces the ordinary common law principles of master and servant; *for it is conceded by the learned counsel that the defendant is liable under the common law principle, and to that extent certain-*

ly; and I find no difficulty in adjudging that this case falls clearly within that principle." (Italics ours.)

After adverting to common law cases, such as *Railroad Co. vs. Derby,* 14 How. 468, the Court proceeds:

> "But, after all, this case falls, in my judgment, within the Tennessee rule of liability" (157).

Accordingly, the case only stands for the proposition that under the *common law* of Tennessee the employer is liable for a willful assault committed by the mate of the vessel.

The next case where the vessel owner was held liable for assault committed by a superior officer other than the master, is that of *Memphis & Newport Packet Co. vs. Hill, supra.* There, the vessel owner was held liable for an assault committed by the captain of the watch, who was placed in charge of loading the vessel by the mate, who was acting as the master of the vessel. It was argued by the vessel owner that there was no liability under the fellow-servant rule. The Court stated in its opinion:

> "These cases, to which our attention s especially invited, enunciate nothing nore than the familiar doctrine of the common law that where two persons stand to each other in the relation of fellow servants of a common master,

neither can hold the master responsible for injuries sustained in consequence of the negligent act of the other. But this doctrine, we think, has no application to the case in hand. The injuries complained of by the libellant were not occasioned by the negligent act of Wright, while he and the libellant were working side by side as fellow servants, but they were willfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that office had the same power to give orders to the deckhands and direct them what to do as the mate. It has been held, and we think with good reason, that where a deckhand is thus selected by the master or mate to act as captain of the watch and to exercise authority and control over other deckhands, he is for the time being an officer of the vessel or steamer, within the fair meaning and intent of Section 5347 of the Revised Statutes (U. S. Comp. Stat. 101, p. 6331) which makes it a crime for an officer of an American vessel to willfully beat or wound a member of the crew without just cause (*U. S. vs. Trice* (D. C.) 30 Fed. 490). It is also a well-known rule of law that a master is responsible for willful assault or trespass, such as the one complained of in the present

instance, that is committed by his servant while the latter is immediately engaged in doing the work of the master, and is discharging those duties of the master that have been devolved upon him. (*Philadelphia & Reading R. R. Co. vs. Derby,* 14 How. 468, 486, 14 L. Ed. 502, Am. & Eng. Encyc. of Law, 2nd Ed. Vol. 2, p. 990, and cases there cited.

"If the mate of the steamer *Orlando,* while urging the crew to do their work more rapidly, had inflicted the blow which broke the libellant's arm, without just cause, the owners of the steamer would doubtless have been liable for the tort (*The General Rucker,* (D. C.) 35 Fed. 152, 157, 158; and no good reason is perceived why the owner of the steamer should not be held liable for the same wrongful act when committed by one who at the time of the assault, at the direction of the mate, who was acting as master, was exercising the authority of the mate and was for the time being an officer. It is doubtless true that a master cannot be held liable for a willful assault which one of his servants commits upon another when they are working together as fellow-servants; but if such an assault is committed when, as in the present instance, the one who commits the assault is exercising over the other all the power and authority of master and is so doing by

his appointment, we know of no reason why the master should escape liability because on some occasions the two men worked side by side as fellow-servants.' (pp. 247, 248.)

There is no discussion as to whether the maritime law differs from the common law and while it is not so specifically stated in the opinion, it is apparent that the case was decided on the common law of Tennessee. This decision was handed down about five weeks after *The Osceola* decision. Apparently, the Circuit Court of Appeals was not cognizant of that opinion, for it is not referred to. The Court recognized the common law doctrine of non-liability of the employer for assaults committed by fellow-servants, but held that the assaulting officer, namely, the captain of the watch, was not a fellow-servant. If this Court still adheres to the fellow-servant rule in admiralty, then this decision is specifically overruled by Proposition 3 in *The Osceola*. If, on the other hand, this Court repudiates the fellow-servant doctrine in admiralty, then, of course this case is equally incorrect.

In *Fein vs. United States, supra,* an action was brought by a seaman to recover damages for an assault committed by an officer. The Court held:

"I will not discuss the liability of the ship because of the understanding I have that the ship is not liable unless it ha

failed to use due care and precaution in making the ship seaworthy,—that is, in respect to employing careful and capable officers, and officers that will conduct the business abroad thereof according to law and the rules and regulations of the Department. So that the ship itself must be relieved of any liability."

While the Court used the term "ship", it must be interpreted to mean shipowner, as the suit was in personam. This latter case we think correctly states the law, although it was repudiated by the Court below.

It is, therefore, respectfully submitted that the Court below was in error in holding the petitioner liable for indemnity, both on reason and authority, for injuries sustained by the respondent.

POINT II.

The opinion below improperly construed the so-called Corporal Punishment Statute, Title 46, Section 712, U. S. C. A., R. S. Sec. 4611; Dec. 21, 1898, Chap. 28, Sec. 22, 30 Stat. 761; March 4, 1915, Chap. 153, Sec. 9, 38 Stat. 1167.

This statute provides as follows:

"712. *Corporal punishment.* Flogg-

ing and all other forms of corporal punishment are prohibited on board of any vessel and no form of corporal punishment on board of any vessel shall be deemed justifiable, and any master or other officers thereof who shall violate the aforesaid provisions of this section, or either thereof, shall be deemed guilty of a misdemeanor, punishable by imprisonment for not less than three months nor more than two years. Whenever any officer other than the master of such vessel shall violate any provision of this section, it shall be the duty of such master to surrender such officer to the proper authorities as soon as practicable, provided he has actual knowledge of the misdemeanor, or complaint thereof is made within three days after reaching port. Any failure on the part of such master to use due diligence to comply herewith, which failure shall result in the escape of such officer, shall render the master or vessel or the owner of the vessel liable in damages for such flogging or corporal punishment to the person illegally punished by such officer. (R. R. Sec. 4611; Dec. 21, 1898, c. 28, Sec. 22, 30 Stat. 761; Mar. 4, 1915, c. 153, Sec. 9, 38 Stat. 1167)."

On this feature the opinion of the Court below was:

"The statute creates a new ground of liability against the master, and the declaration that ship or owner are also liable may have been inserted to preclude the contrary inference which might have been drawn had the master's liability alone been mentioned."

We think this is a strained construction of the Act. If, as the opinion below indicates, the shipowner is already under an existing liability under the doctrine respondeat superior, where an assault is committed by one other than the master, then so much of this Statute as imposes liability on the shipowner is a mere useless gesture. If any speculation as to why Congress inserted a provision making the owner or vessel liable is to be indulged in, it would seem to be the reverse of that drawn by the Circuit Court of Appeals. Certainly the words of the Statute are plain and we think the intention of Congress was to provide a remedy against the owners in view of the previous non-liability under the General Maritime Law.

In the one case which we have been able to find, where this section was involved, *The Blakeley*, 234 Fed. 959, Judge Neterer was under the impression that the purpose of the act was to give a right of action where none existed before, for he said:

"The intent of the act was to give the

assaulted seaman the right to recover fo
injury."

It is to be observed that the statute di
not create a right of recovery for a willful as
sault *per se*, but only for an assault committe
by way of flogging or corporal punishmen
Consequently, the assault in the case at ba
comes within the terms of this statute. Ther
can be no liabiliy under the statute becaus
there was no proof that the assaulting office
had escaped, which under the terms of th
statute is the condition precedent to recover

If there was an existing liability against th
shipowner at the time this statute was passe
then the statute is so much verbiage and
mere idle gesture on the part of Congres
It is petitioner's contention that this statut
was passed to provide a remedy where non
before existed, and that the Circuit Court o
Appeals erred in failing to so hold.

POINT III.

Even assuming the doctrine of respondeat superior is applicable under the General Maritime Law in cases involving personal injuries, the circumstances under which the assault occurred are such as to bring the facts within the rule laid down in Davis vs. Green, 260 U. S. 349.

The facts in *Davis vs. Green, supra*, taken from the decision of the Supreme Court of Mississippi, 125 Miss. 476, are as follows:

Green, the conductor of a train, was in charge of a switch crew, and the engineer was in charge of switching cars from one point in the railroad yard to another point. It was the duty of the conductor to move the switch in the absence of the switchmen. The engineer and the switchman engaged in an altercation as a result of which the switchman left his post. The engineer then proceeded to move his engine along his route and the engineer and conductor engaged in an argument as to why the conductor had not thrown the switch. The engineer descended from his cab, and, as the Supreme Court of Alabama describes it,

> "with his pistol took his stand in front of the engine, and as Green, the conduc-

> tor, and foreman came up accosted him with this remark: 'Why in the hell have you not thrown the switch?'"

The engineer thereupon shot the conductor. The Supreme Court of Alabama held this act came within the course of the engineer's employment. This Court, speaking through Mr. Justice Holmes, in reversing the Supreme Court of Alabama, said:

> "But neither the allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and willful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a willful act wholly outside the scope of his employment, while his employment was going on. We see nothing in the evidence that would justify a verdict unless the doctrine of respondeat superior applies."

In the instant case, the engineer left his place of employment, the engine room (fols. 219-222) and engaged in an argument over the respondent's coming late on watch, as a result

of which the assault occurred. If the assault in *Davis vs. Green* was not in furtherance of the master's business, it seems to us that the assault here was likewise not in furtherance of the master's business. It was as Justice Holmes so aptly remarked: "A willful act wholly outside the scope of his employment while his employment was going on." Hence we respectfully urge that the Court below adopted a mistaken view of the decision.

CONCLUSION

The judgment should be reversed and the complaint dismissed.

CARVER W. WOLFE,
Counsel for Petitioners.

APPENDIX

DIGEST OF FEDERAL CASES INVOLVING ASSAULTS WITH BRIEF COMMENTS THEREON.

APPENDIX

DIGEST OF FEDERAL CASES INVOLVING ASSAULTS WITH BRIEF COMMENTS THEREON.

In *Anderson vs. Ross*, 2 Sawy. 91, Fed. Cas. No. 361, the Master of the vessel was held liable for injury to a member of the crew caused by an assault committed by the Second Mate in the Master's presence. The Court said:

> "I consider it of much importance that masters should feel it to be as much their duty to restrain the violence of the officers as it is to repress the insubordination of the men, and they will be held responsible if they fail to do their utmost to protect the men from the outrages on the part of the inferior officers, which have so often brought disgrace upon our mercantile marine."

In *Backstack vs. Banks*, Fed. Cas. No. 711, the mate was held liable for an assault upon a seaman.

In *Butler vs. McClellen*, Fed. Cas. 2242; 1 War. 219, libel was filed against the Master

and Mate for an assault committed by the Master and the mate acting under the Master's instructions. The Court dismissed the libel as against the Mate on the theory that the Mate was acting under the express instructions of the Master, but held the Master liable for the assault.

In *Foye vs. Lecki*, Fed. Cas. 5023; 1 Spr. 210, the Master was held liable for unlawful imprisonment of the second mate.

In *Gardiner vs. Bibbins, et al.*, Fed. Cas. 5222, the Master was held liable for an unjustifiable imprisonment of a seaman.

In *Hansen vs. Fowle*, Fed. Cas. No. 6042, the Master was held liable for an unjustifiable assult committed by an officer upon a member of the crew with his connivance, consent and authority.

In *Morris vs. Cornell*, Fed. Cas. 9829, 1 Spr. 62, Master was held liable for an unjustifiable assault upon the second mate, arising out of the mate's insubordination.

In *Payne vs. Allen*, Fed. Cas. 10855 1 Spr. 304, the Master was held liable for an unjustifiable assault committed by him on a seaman.

In *Ringgold vs. Crocker*, Fed. Cas. 11843; 1 Abb. Adm. 344, suit was brought against the owners to recover for injuries caused by an assault committed by the mate. It was assumed by both parties that the limit of recovery was

maintenance and cure, and no attempt was made to secure indemnity. In holding the owners liable for maintenance and cure, Judge Betts stated:

> "A sailor must, in judgment of law, be deemed in the service of the ship, whilst under the power and authority of its officers, and an injury received by him in executing an improper order, or inflicted on him directly, by the wrongful violence of the officer in the exercise of his rightful power and command over him as an officer, must equally entitle him to this privilege secured him by the law maritime.
>
> The ancient sea ordinance, which provided that mariners falling sick during the voyage or hurt in the performance of their duty, should be cured at the expense of the ship. (*Curtis Merchant Seamen*, 106, Note 2)."

This is the first case which we have been able to find where the owner was made a party in an assault action. It is undoubtedly correct.

In *Sheridan vs. Furber*, Fed. Cas. No. 12761, the mate was held liable for an assault committed by orders of the master.

In *Thomas vs. Lane*, Fed. Cas. 13902, the master and mate were held liable for an assault committed by a seaman in his presence.

In this latter case, Mr. Justice Story said:

"The Master has the supreme authority on board of his ship; and has moreover a sort of parental responsibility and duty devolved upon him for the due exercise of it. It is his duty to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent and to encourage it; for no officer in his presence has any right to inflict punishment without his assent or direction, unless upon an emergency which admits of no delay. It is not sufficient for him to excuse himself from this interposition, upon any notion of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has entrusted him with summary powers for the good, not of the officers alone, but of the crew also, and, indeed, for the general good of the maritime service, in which he is engaged. While he should uphold the just discipline of the ship with a steady con-

fidence, he is to take care that the crew is not made victims of the insolence, the passions or the caprice of the officers under him. If he will stand by and see the seamen cruelly, brutally and unjustifiably beaten, without interference, he ought not to complain that the law forces upon him the conclusion that he approves of what is done and means to encourage it by his license and authority. He becomes thereby the abettor and supporter of the deed, upon the reasonable ground that he who knowingly allows oppression, shares the crime."

This latter quotation was approved in the case of *Hansen vs. Fowle, supra.*

In *Murray vs. White, et al.*, 9 Fed. 562, (D. C. Maine, 1881) the master and mate of a vessel were held liable for an unjustified assault committed by the mate in the presence of the master.

In *Riley vs. Allen*, 23 Fed. 46, (D. C. Tennessee, 1885), suit was brought *in personam* against the officers and owners of a steamboat for an assault committed by the mate. It is impossible to tell from the opinion whether the owners were held liable. Certainly the officers were. If the headnote means anything, the decree was only against the officers.

Spencer vs. Kelley, 32 Fed. 888 (C. C. Ohio, 1887) is the first case we have been able to find

where the owner alone was sued for indemnity in an assault case. There the assault was committed by the master. Judge Welker, in instructing the jury, charged as follows:

> "If this injury had been done by the carelessness of the co-laborers of this plaintiff, working in the same capacity as the plaintiff was, the owner of the vessel would not be liable; but for any negligence, or carelessness, or injury inflicted upon subordinates by the master of the vessel, who had the right to control it, the owner of the vessel would be responsible (p. 839). * * This defendant, personally, had nothing to do with this transaction, but he is liable for same because of the acts of his master on board the vessel. He is not liable for every act that the master may do on board of his vessel; but I direct you that, to make the defendant liable for the conduct of the master of his vessel, it must be shown that in the infliction of the injury complained of in this case, the master was acting within the scope of his duties as such master and in the exercise of his control over the plaintiff on that occasion (839). * * * But if enough time elapsed between the two (assaults), so as to show that the assault made outside on the deck was made by way of punishment on the part of the master for disobedience occurring before

and when there was no necessity for it, I direct you, in that respect, that, although the master would be liable, yet the owners of the vessel would not be liable for such action and this injury" (p. 840).

The next case is *The General Rucker*, 35 Fed. 152, (D. C. Tennessee, 1888). There the owner was held liable for an assault committed by the mate on a seaman while loading the vessel. This is the first case we have found where the owner has been held liable. The decision, however, was based on the common law of Tennessee. The Court said:

"But after all, this case falls, in my judgment within the Tennessee rule of liability; and it is always more a question of its application to the particular circumstances than a question of the extent of that rule in imposing liability. What I hold here is that a roustabout, employed in loading the vessel under the command of the mate, who is wounded by the blows of the mate, given because he does not obey his orders, can recover for the injury against the owner, because that business about which they are both engaged is within the scope of the master's employment, and clearly so. If it were not, the rule of the liability of the master for the willful torts of his servant while thus engaged would

be substantially abrogated" (pp. 157, 158).

The Court took occasion to state that the mate had a bad reputation; that he had been arrested for similar offenses three times before, and that the defendant, when employing him, warned the mate against abusive treatment. If the basis for liability in this case was the employment by the owner of a notoriously brutal mate, with knowledge, the case is correct. But if it rests on the common law of Tennessee, it, of course, has no binding force.

The case was followed in *Memphis Packet Co. vs. Hill and The Vueltajabo, infra.*

In *Cole vs. Tollison, et al.*, 40 Fed. 303, (D. C. South Carolina, 1889), a libel was filed against the master and mate for assault committed by the mate. In discussing whether an order of arrest should issue without libellant furnishing security, Judge Simonton said, in denying the order of arrest:

"The libel does not say whether the master witnessed it or not. Now, if we assume that these statements are all true, that the master was on deck, and that he saw the blows struck, there is no evidence that he was aware of the intention of the mate to assault the libellant, or that he could have prevented it; so he cannot be held liable for the assault and battery. The assault was mo-

mentary and there was no need for further interference. The case does not come within *U. S. vs. Taylor*, 2 Sumn. 584; *Murray vs. White*, 9 Fed. 562" (p. 304).

In *Padmore vs. Piltz*, 44 Fed. 104, (D. C. Washington, 1890) Judge Hanford held the master of the vessel liable for assaulting the libellant with a belaying pin.

In *Mellor vs. Cox*, 45 Fed. 115, (D. C. South Carolina, 1891), the master was sued for an assault committed by the mate before the master could interfere. It was held that the master was not liable under these circumstances.

In *Gabrielson vs. Waydell*, 67 Fed. 342 (E. D., N. Y. 1895), the owners of the vessel were held liable for an assault on a seaman committed by the master. This was an action at law, and the opinion was rendered on a motion in arrest of judgment. Judge Wheeler said:

"The principal question in this case is whether the defendants, as owners of the bark 'Rebecca Caruana' are liable to the plaintiff, a seaman, for injuries violently done to him, when sick, by the master, on the high seas. The plaintiff brought suit in the courts of the State for the same injuries, and a judgment in his favor was reversed by the Court of Appeals as not maintainable against the defendants. *Gabrielson vs. Waydell*, 135 N. Y. 1, 31 N. E. 969."

After holding that the judgment in the State Court was not a judgment on the merits, as after the reversal by the Court of Appeals a default judgment was taken by the defendant for costs, the Court proceeded:

> "If in any case an agent could represent the principal about the treatment of a servant, a shipmaster would seem to represent the owners about the treatment of the seamen. * * * * * To wrongfully make a seaman sick or sicker, would seem to be as much of a breach of the duty to cure as wrongful neglect to cure in existing sickness would be. * * * * While the master is in some sense an officer and is often referred to as such in authorities and cases of the sea, he is appointed to his place solely by the owners, and what is called his official capacity seems to be only the large scope of authority going with the appointment from the policy and necessities of the case. By whatever name the authority of the master may be known, it appears to come from the owner. That cases were not brought by seamen for acts done under this authority, shows the understanding of the profession, which is of great weight, but does not show what would have been done with them if they had been brought. Actions upon the liability of principals for acts done by agents placed over others

are of comparatively modern origin, although the principals underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as in others" (pp. 343, 344, 345).

The case was reversed on other grounds in 76 Fed. 380.

The decision was specifically based on *Railway Co. vs. Ross*, 112 U. S. 377, which case was formally overruled by the Supreme Court in *Railroad Co. vs. Conroy*, 175 U. S. 323.

Of course, this case is correct. The basis of liability was the breach of the duty of good treatment by the master of the vessel, and was so held on appeal.

The Court of Appeals in the action between the same parties in the State court, held, with dissent:

"We find that for an injury resulting to an employee from the willful neglect, or tortious act of another, who is engaged in a common employment with him, the master is not liable at the suit of the injured employee."

Gabrielson vs. Waydell, 135 N. Y. 1, 10.

In *The Miami*, 78 Fed. 818 (D. C., S. D.

Alabama, 1896), an action *in rem* by a stowaway to recover for assault by the master, Judge Toulmin held:

> "The facts alleged show it to be a case of assault and battery by the master. It appears from them that the master intentionally inflicted unlawful violence upon the libellant. This is assault and battery. *The Lord Derby*, 17 Fed. 265. This suit cannot be maintained against the vessel. Admiralty Rule 16" (p. 819).

In *The Marion Chilcott*, 95 Fed. 688, (N. D., Washington, 1899), libel was filed against the vessel to recover charges for an assault committed by an officer of the vessel. The Court held the assaults were committed in violation of the duty of the master to protect the crew from brutal treatment. At page 689, Judge Hanford held:

> "But I hold that the vessel is liable in this case for the consequences of abusive treatment on the part of the first mate, which should have been prevented by the captain. It was the duty of the captain to maintain proper discipline on the ship, and to protect members of the crew from abuse at the hands of his subordinate officers; and neglect to perform his duty in that respect renders the ship liable for the effect of such abuse."

Here again the basis of the decision is the failure of the master to protect the seamen.

Following this came *Olsen vs. Oregon Coal & Navigation Co.*, 96 Fed. 109 (aff'd 104 Fed. 574), (C. C. A. 9th, 1900.) In the lower court, Judge Ross held:

"It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to the seaman, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury or sickness, and for his neglect in any of these particulars the owner is liable. The cases of *Gabrielson vs. Waydell*, (C. C. 67 Fed. 342; *The A. Heaton* (C. C. 43 Fed. 592; *Anderson vs. The Rence*, 14 Sawy. 476, 46 Fed. 805; and *The Chandos*, 6 Sawy. 546, 4 Fed. 645, were cases of that character. * * It is very clear that upon common law principles the owner would not be liable for an injury sustained by one of such employees by reason of the negligence of one of his co-employees, whatever his grade in the common employment. In the recent case of *Railroad Co. vs. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, Adv. Sup. S. 85, 44 L. Ed.

181, where the case of *Railroad Co. vs. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, was fairly and squarely overruled, the Supreme Court announces the true rule to be, both upon principle and authority. 'That the employer is not liable for an injury to one employee occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption as they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end'" (p. 576).

In *The South Portland*, 111 Fed. 767, (D. C. Washington, N. D. 1901), Judge Hanford held the vessel liable for the wrongful imprisonment of a seaman by the master, in violation of the Act of December 21st, 1898.

Dorrell vs. Schwerman, 111 Fed. 209, (D. C. Wisconsin, 1901) is another case of an assault committed by a master.

In *The Eva B. Hall*, 114 Fed. 755, (S. D., N. Y. 1902) suit was brought against the vessel

to recover for failure of the master to treat a seaman who had been injured through an assault committed by the mate. Judge Adams, in the course of his opinion, said:

> "The mate has disappeared, but the libellant does not seek to hold the vessel for the original injury, nor does the vessel claim that the blow was justified in any way. It is assumed by the parties, for the purpose of this action, that there was no fault on the part of the libellant or of the vessel, as far as the blow is concerned, but the libellant complains that, instead of thereafter receiving the care he was entitled to from the vessel, the master wrongfully compelled him to work during the whole of the remainder of the voyage, a period of eleven days, threatening to place him in irons unless he should do so. * * *"

Accordingly, while no recovery was allowed for the assault, the vessel was held liable for the failure of the master to treat the seaman after he had been wounded. Cited with approval in *The Cuzco*, 154 Fed. 177 (C. C. A. 2nd, 1907).

In *The Lizzie Burrill*, 115 Fed. 1015, (D. C. Alabama, 1902) Judge Toulmin held the vessel liable for an assault committed by the master upon a seaman, on the theory that the master of the vessel was the owner's representative

to enforce the owner's obligation of decent and humane treatment to seamen. He stated, page 1016:

> "The weight of evidence clearly shows not only bad treatment, consisting of assaults and beating, by the third mate and the boatswain, but by the master himself. The master's personal violence does not appear to have been so frequent or continuous, but it does appear that he not only did not protect the libellant from the bad treatment and from violences committed by the mate and boatswain, of the mate particularly, which it seems was continuous and persistent, but that he on more than one occasion at least encouraged it with his acts of omission as well as commission, and which were more frequent, were a breach of duty on his part, for which, in my judgment, the vessel is liable."

This case is correct.

Johnson vs. Mowatt, 115 Fed. 844, (E. D. Pennsylvania, 1902), McPherson, *D. J.* This was an action by a seaman against the master. Libellants refused to work while the master was ashore. When he returned, he demanded why, and was told one was sick and another wanted a safer ship, etc. Havana being under military law, the master requested permission of the military authorities to discharge libellants. This was refused, but the military au-

thorities arrested the men. When brought back aboard ship, the mate put one of the men in irons, in the absence of the master. The action was brought to recover for alleged false imprisonment. After discussing the act of December 21st, 1898, forbidding imprisonment, the Court held:

> "Assuming this to be correct, the question still remains whether the present respondent is liable, and upon this point the testimony satisfies me that neither the imprisonment on shore nor the punishment on board the ship was inflicted by the direction or at the request of the master. * * * It nowhere appears that the action of the mate in putting Johnson in irons for a few hours after his return to the vessel was ordered by the captain, or that he was present when it was done. I see no ground, therefore, upon which the respondent can be liable" (p. 845).

Memphis & Newport Packet Co. vs. Hill, 122 Fed. 246, (C. C. A. 8th, 1903). This was an action by a seaman for an assault committed by the captain of the watch, who was appointed by the mate acting as master, to supervise shifting some cargo on the vessel. The lower Court found that the assault was committed without any provocation for the purpose of compelling the libellant to work more rapidly. Judge Thayer, writing for the Circuit Court

of Appeals, said, page 247:

"The case presents but one question of law for determination by this tribunal, and that is whether the appellant can avoid liability by virtue of the familiar doctrine that a master is not liable for one of his servants in consequence of injuries sustained by reason of the negligence of another servant. This doctrine is invoked by learned counsel for the appellant, and they seek to make it applicable to the case in hand; citing in support of their contention *Alaska Mining Co. vs. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42, L. Ed. 390; *Tuttle vs. Milwaukee Ry.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, and *The Antonio Zambrana* (D. C.) 89 Fed. 60.

"These cases, to which our attention is especially invited enunciate nothing more than the familiar doctrine of the common law that where two persons stand to each other in the relation of fellow servants of a common master, neither can hold the master responsible for injuries sustained in consequence of the negligent act of the other. But this doctrine, we think, has no application to the case at hand. The injuries complained of by the libellant were not occasioned by the negligent act of Wright while he and the libellant were working side by side as fel-

low servants, but they were willfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that office had the same power to give orders to deckhands and direct them what to do, as the mate. It has been held, and we think with good reason, that where a deckhand is thus selected by the master or mate to act as captain of the watch, and to exercise authority and control over other deckhands, he is for the time being an officer of the vessel or steamer, within the fair meaning and intent of Section 5347 of the Revised Statutes (U. S. Comp. Stat., 1901, p. 6331) which makes it a crime for an officer of an American vessel to willfully beat or wound a member of the crew without just cause. *U. S. vs. Trice,* (D. C.) 30 Fed. 490. It is also a well known rule of law that a master is responsible for a willful assault or trespass, such as the one committed in the present instant, that is, committed by his servant while the latter is immediately engaged in doing the work of the master and is discharging these duties of the master that have been devolved upon him. *Phila. & Reading R. R. Co. vs. Derby,* 14 How, 468, 486, 14 Law Ed. 502, Am. & Eng. Ency. of Law (2nd Ed.), Vol. 2, p. 990, and cases there cited.

"If the mate of the steamer *Orlando*, while urging the crew to do their work more rapidly, had inflicted the blow which broke the appellant's arm, without just cause, the owners of the steamer would doubtless have been liable for the tort (*The General Rucker*, (D. C.) 35 Fed. 152, 157, 158); and no good reason is perceived why the owner of the steamer should not be held liable for the same wrongful act when committed by one who, at the time of the assault, by direction of the mate, who was acting as master, was exercising the authority of the mate and was for the time being an officer. It is doubtless true that a master cannot be held liable for a willful assault which one of his servants commits upon another when they are working together as fellow servants. But if such an assault is committed when, as in the present instance, the one who commits the assault is exercising over the other all the power and authority of the master, and is doing so by his appointment, we know of no reason why the master should escape liability because on some occasions the two men worked side by side as fellow servants" (pp. 247-248).

We think this case is against the weight of authority and is wrong in principle. The case is directly contrary to the decision of the Supreme Court in *The Osceola*. As the *Hill*

case was decided immediately after *The Osceola*, it is doubtful if this case was brought to the Court's attention. As the case was apparently solely based on the doctrine of *respondeat superior* and is in conflict with *The Osceola*, whatever authority it once had is no longer in force. It has only been cited once, and then on question of disturbing finding of fact on appeal. *Perriam vs. Pac. Cast. Co.*, 133 Fed. 140 (C. C. A. 9th 1904),

In *The Astral*, 134 Fed. 1017, (E. D. Penn., 1905), suit was brought by a seaman against the vessel to recover for assault committed by the first officer. The Court held:

> "Assuming these averments of fact to be established by the evidence, the important question arises whether an action against the ship can be maintained for the master's breach of duty. That an action *in personam* would lie against the mate and also against the master cannot be denied, but this does not answer the question just stated. An action *in rem* for a similar neglect of duty was sustained in *The Marion Chilcott*, (D. C.) 95 Fed. 688, and *The Lizzie Burrill* (D. C.) 115 Fed. 1015; but these cases were both decided before the appearance of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and must, of course, give way to the ruling of the Supreme Court."

In *The Sallie Ion*, 153 Fed. 659, (E. D. Penn, 1907) suit was brought against the vessel to recover for an assault committed by the master. Judge McPherson, after holding that the action would not lie *in rem* because of Admiralty Rule 16, also held that under *The Osceola* decision the vessel would not be liable *in rem* for the negligence of the master. The Court said, page 660:

> "Now, surely, if an action *in rem* will not lie to redress an injury caused by the negligence of the master, still less will such an action be permitted where the wrong of the master has been wanton and malicious, an act not even connected with the performance of his duty in the care and management of the ship. In *The Osceola*, the master was engaged in the business of navigating the vessel and negligently gave a wrong order. Here, he was not employed in any branch of his duty but committed the assault on the libellant without provocation or just cause — in other words, wantonly and maliciously. At least in the absence of proof that the master was known to be of violent temper and given to such dangerous outbreaks—and perhaps not even then—there is no reason why the ship should be liable for conduct of this kind, and rule 16 is probably founded on the injustice of making the vessel suffer for a criminal act that is only con-

nected with the ship because it has been committed upon her deck by one of her officers."

The libel was thereupon dismissed.

In *The Vueltajabo*, 163 Fed. 594, (D. C. Alabama, 1908), Judge Toulmin held that the vessel was not liable *in rem* for an assault committed by the master upon one who was employed by the owners of the vessel to navigate a launch when the vessel arrived at the port of destination. He stated in his opinion:

> "But whether libellant was a member of the crew, or rightfully on the vessel as an employee of her owners, being there by their direction or permission, he would be entitled to recover for any injuries cruelly, unnecessarily and improperly inflicted on him by the master. The owners and master would be liable by suit *in personam* in a court of admiralty or by the proper action in a court of common law" (p. 597).

In *Belyea vs. Cook*, 162 Fed. 180, (D. C., N. D. California, 1908), the action was brought for an assault and wages against the master of the vessel. Some of the assaults were committed by the master and some by the mates. Judge DeHaven said, page 182:

> "That this libellant was, upon two or

> three occasions, struck and beaten by the mates of the 'Bowhead'; but this does not appear to have been done with the consent of the master, except perhaps on one occasion, the master witnessed the assault."

Thereupon recovery was allowed only for the assault committed by the master.

In *The David Evans*, 187 Fed. 775 (C. C. A. 9th, 1911) suit was brought by a seaman against the vessel for breach of duty of good treatment, occasioned by reason of the alleged assault committed by the master on the seaman. It was found on the facts that while the master did strike the seaman, it was done to repel an attack in defense of his person. The libel was accordingly dismissed.

In *Wolfe vs. Thomas*, 268 Fed. 464, (C. C. A. 6th, 1920) an action was brought by a seaman to recover damages for an alleged assault committed by the master of the vessel. The decree of the District Court allowing damages was reserved because of error committed by the Trial Court in connection with allowing certain evidence. Judge Donohue, however, recognized the liability of the owner in the following language:

> "It does not appear, however, that the injury sustained by libellant from the assault and battery on the boat was of so light and trivial a nature as to re-

quire the dismissal of the libel. On the contrary, it does appear that he was struck twice with an iron pipe. It is needless to say that these blows must have caused some pain and suffering. This libellant is entitled to recover damages in this action for whatever injury he suffered from the violence inflicted upon him on board the vessel, including such physical and mental pain and suffering as necessarily resulted therefrom" (p. 467).

In the case of *The Rolph*, 293 Fed. 269, affirmed 299 Fed. 52 (C. C. A. 8th, 1925), the vessel was held liable for an assault committed upon a seaman by a mate. Judge Hunt, writing for the Circuit Court of Appeals, held, page 55:

"From these and many other decisions, in which the courts have discussed the duty of the shipowner, we conclude that it is but reasonable to say that a ship is not properly equipped for a voyage, where the mate is a man known to be of a most brutal and inhuman nature, one known to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors. Such a man may be ever so skilled and competent in navigation and seamanship, nevertheless he is wholly incompetent to fill a

place of authority which calls for the exercise of a sense of natural fairness to men under him. * * * * *

"It is said that the owner does not select the mate, and, therefore, the ship cannot be held, but it is established that while the master of the ship selects the mate, in so doing he is the representative of the owner in respect to the obligation to equip the ship with a competent officer to make her seaworthy, and the duty of the owner in such respect is not one to be delegated, *Rainey vs. N. Y. & P. S. S. Co., supra*, or avoided by the plea that the master did not know the ship was unseaworthy when the voyage commenced. It would follow, therefore, that if the master fails, and by reason of failure the ship is unseaworthy and injuries are done by willful assaults upon a seaman, the owner may be liable. * * * * *

"As already said, the breach on the part of the owner of *The Rolph* was the failure to supply a properly equipped ship. There was unseaworthiness, and, therefore, recovery may be had for injuries appellees received in consequence of unseaworthiness."

This case is undoubtedly correct.

In the case of *Schooner Robinson*, 1925 A.

M. C. 684 (E. D. Pa. 1925), an action was brought *in rem* to recover for an assault committed by one member of the crew on another member of the crew. Judge Brown said:

> "Counsel for the libellant contends that the instant case is distinguishable in that the present libel was based upon the duty of the owners through the master to maintain proper order and discipline upon the ship, and cites *The Marion Chilcott*, 95 Fed. 688; *The A. Heaton*, 43 Fed. 592; *The Governor Ames*, 55 Fed. 327; *The Lizzie Burrill*, 115 Fed. 1015, and other cases, in which it has been held that an action *in rem* will lie to recover damages for loss or injury arising through the neglect of the duty of the master to maintain the discipline which should govern the conduct of those under his authority. That that is not the law is ruled in *The Osceola*, 189 U. S. 158, where the cases are thoroughly reviewed by Mr. Justice Brown, and at page 175 the Learned Justice summarized the law as settled upon the following proposition: 'That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.' The law thus expressed clearly rules this case and the exceptions are

therefore sustained, and the libel dismissed."

This case we think is correct, as there was apparently no evidence that the assault was committed in the presence of the master or that he ratified it or that he could have prevented it. It is also worthy of note that the Court considered *The Osceola* of binding authority, so far as liability for assault was concerned.

In *Fein vs. United States*, 1925 A. M. C., 552 (D. C. Oregon, 1925), an action was brought by a seaman to recover for an assault committed by an officer other than the master. The Court said:

> "I will not discuss the liability of the ship, because of the understanding I have that the ship is not liable unless it has failed to use due care and precaution in making the ship seaworthy—that is, in respect to employing careful and capable officers, and officers that will conduct the business aboard thereof according to law and the rules and regulations of the Department. So that the ship itself must be relieved of any liability."

The Court proceeded to assess damages against the mate, who committed the assault and who was a joint respondent.

While the Court used the word ship, it must be interpreted to mean owners, as the suit was *in personam*. The case is undoubtedly correct.

We have, perhaps, made an unnecessarily exhaustive survey of the cases on the subject, but there is so much confusion in the law that we thought it advisable to collect all the cases which were available. The cases certainly support petitioners' contention of non-liability for assaults committed by an officer other than the master, where there is no violation of the owners' contractual duty and no ratification of the assault.

FREE COPY

NOV
CHARLES E

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 457.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of Walker & Daly,
Petitioners,

against

ROBERT CAIN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

MELVILLE J. FRANCE,
Counsel for Respondent.

THOMAS J. CUFF,
VINE H. SMITH,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
STATEMENT	1
NATURE OF CASE AND OUTLINE OF FACTS	2
QUESTIONS PRESENTED	3
POINT I. Rule *respondeat superior* applies	4
POINT II. Corporal flogging statute affords no basis for application	12
POINT III. The evidence shows petitioners' offending employee was acting within the scope of his employment	13
CONCLUSION	18

LIST OF AUTHORITIES CITED.

A. STATUTES:

Corporal Punishment Statute	3
Federal Employers Liability Act	10
Merchant Marine Act of 1920	6

B. DECISIONS:

Avondale Mills *v.* Bryant, 10 Ala. App. 507, 63 So. 932	9
Bayley *v.* Manchester, etc. R. Co., L. R. 8 C. P. 148, 28 L. T. 366	16, 17
Chelentis *v.* Luckenbach S. S. Co., 247 U. S. 372, 380	6
Chesapeake, etc. R. R. Co. *v.* Stojanowski, 198 Fed. 77 (2nd Circuit)	15
Dyer *v.* Munday, 64 L. J. Q. B. 448 (1895), 72 L. T. 448	16
Encarnacion *v.* Jamison, 251 N. Y. 218	10
Fleming *v.* Tarboro Knitting Mills, 161 N. C. 436, 77 S. E. 309	9

PAGE

Gabrielson *v.* Waydell, 135 N. Y. 18 ..... 8, 10, 12
General Rucker, The, 35 Fed. 152 ..... 8, 14
Hudson Bay *v.* Vaillaincourt, 2 Dom. L. R. N. S. 1008 14
Jebeles-Colias, etc. Co. *v.* Booze, 181 Ala. 456, 459-60 ..... 4, 9
Magar *v.* Hammond, 183 N. Y. 387, 390-1 ..... 15, 18
Mali *v.* Lord, 39 N. Y. 381 11
Memphis & N. Packet Co. *v.* Hill, 122 Fed. 246 ..... 8, 9, 14
Osceola, The, 189 U. S. 158 ..... 7, 10
Palos Coal & Coke Co. *v.* Benson, 145 Ala. 664, 39 So. 727 8
Panama Ry. Co. *v.* Johnson, 264 U. S. 375, 389 ..... 6, 9
Phila. & Reading R. Co. *v.* Derby, 14 Howard, 468, 486 15
Richard *v.* Amoskeag Mfg. Co., 109 Atl. 88 (N. H.) s. c. 8 A. L. R. 1426 ..... 8, 14
Roberts *v.* Southern R. R. Co., 143 N. C. 176, 55 S. E. 509; 8 L. R. A., N. S. 798 9
Rogahn *v.* Moore Mfg. Co., 79 Wis. 573, 48 N. W. 669 9
Ruckers, The (4 Rob. Ad. Rep. 60) 12
Steamboat Co. *v.* Brockett, 121 U. S. 637, 645 ..... 15, 16
Tillar *v.* Reynolds, 96 Ark. 358; 131 S. W. 969; 30 L. R. A., N. S. 1043 9
Vueltabajo, The, 163 Fed. 594 ..... 8, 13
Wolfe *v.* Thomas, 268 Fed. 464, 467 ..... 8, 13

C. Text-Books:

26 Cyc. 1527 11

D. Law Review Articles:

Wigmore, Responsibility for Tortious Acts, 7 Harv. Law Rev. 393, *et seq.* 11

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 457.

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of Walker & Daly,

Petitioners,

against

ROBERT CAIN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Statement.

The petitioners, defendants below, seek a review by this Court of a determination of the United States Circuit Court of Appeals for the Second Circuit affirming a judgment of the United States District Court for the Southern District of New York in favor of respondent entered upon a verdict after trial before Honorable Julian W. Mack, Circuit Judge, and a jury.

Numerical references in this brief indicate pages and folios of the printed record unless otherwise stated.

Nature of Case and Outline of Facts.

Respondent, plaintiff below, at about 1 o'clock in the morning of February 6, 1927, while employed by petitioners as a fireman on their oil tanker *Alpha*, was struck twice by his superior officer, one Jackson, the second assistant engineer, with a monkey wrench, as a result of which assault respondent has permanently lost the vision of his left eye (pp. 46-7, 51-2, 125, 143; fols. 137-9, 157, 374-5, 428). The assault was committed upon the deck of the vessel which was then lying in the harbor of Amuey, Venezuela, preparing to clear for her return voyage (pp. 63, 342, 345, 347; fols. 187, 1026, 1034-8, 1041).

Jackson, at the time of the assault, was in charge and command of the engine room and fire room and of the engine room personnel (pp. 274, 280, 287, 289; fols. 820-3, 840, 859-61, 866-7). The plaintiff was assigned to the twelve to four watch and it was, of course, likewise his period of duty (pp. 280, 315; fols. 840, 943-4).

Jackson committed the assault not in any private quarrel (pp. 294, 315, 319; fols. 881, 944, 956-7), but while acting in the course of his employment—at least the jury and the courts below have so determined. The minor question raised by the petitioners' objection to that determination (Petition, p. 3, Respondent's Brief, p. 10, Point C, pp. 22-4) will presently require some reference to the basic characteristics of the rule *respondeat superior* and a slightly more detailed examination of the evidence (Point III, *post*).

We venture to restate as follows the questions raised by this application for a discretionary review of the judgment at bar based upon this assault:

Questions Presented.

1. May a seaman assaulted on shipboard by an officer acting within the scope of the officer's employment invoke the rule *respondeat superior* in an action against the common employer to recover damages for the assault?

2. Does the Corporal Punishment Statute, U. S. Code, Title 46, Section 712, preclude the assaulted seaman from recovering from the employer?

3. Is there evidence in the record at bar presenting the question of fact as to whether the petitioners' employee who committed the assault was engaged about the master's business and within the scope of his employment?

The first of the questions above outlined is in material substance the same as petitioners' question 1 (Petition, p. 2). The petitioners' statement of the question, however, appears to us inaccurate. One who resorts to the rule *respondeat superior* is, of course, not relying upon the employing shipowner's violation of any duty to protect. He is not relying upon a breach by the employer of any of the duties imposed specially upon the employer. He is relying upon an obligation springing from the fault of another, a subordinate of the employer, for whose actions, however, the law holds the employer civilly answerable.

Nor does the fact that the assault is committed in anger possess any determining materiality. An assault committed without anger, as for the purpose of robbery, would certainly not invoke the rule *respondeat superior,* while an assault committed in anger, as most assaults are, may nevertheless be done in furtherance of the employer's business, *i. e.*, for the purpose of getting the results which it is

the duty of the offending employee (although by proper methods) to obtain. (*Jebeles-Colias, etc. Co.* v. *Booze*, 181 Ala. 456, 459-60.)

Questions 2 and 3 above outlined are, generally speaking, the equivalents of petitioners' questions 2 and 3 (Petition, p. 3).

For the reasons set forth in the following points, it is submitted that none of the questions urged is either novel or doubtful; that in fact the law is clear as to each and that the decision below is so manifestly in accord with sound principles and precedents that no further review is required.

POINT I.

The civil responsibility of the petitioners for the assault committed by their employee, Jackson, while acting in the course of his employment, is settled by authority and is founded upon unassailable principles. The contention that such responsibility is barred by some surviving vestige of the fellow servant rule or by a narrow exception to the rule respondeat superior is sheer special pleading, unsupported by authority and utterly devoid of intrinsic merit.

A.

The principle *respondeat superior* is of universal application and is a part of the law maritime as well as of the common law.

There is, of course, nothing in the law maritime as distinguished from the common law, or in maritime relations as distinguished from others, which precludes the operation of the rule *respondeat superior*. The operation of that rule

is seen in the responsibility of water carriers for the acts of their representatives, which is broadly parallel to the like responsibility of land carriers. It is likewise manifest in the general responsibility of operators of ships for the torts committed by their employes to whom the actual functions of operation are entrusted.

But it is suggested that the right of a seaman to maintenance and cure precludes him from relying on the rule *respondeat superior.* Why? The right to maintenance and cure is an incident of the employment, derived in the first instance from necessity and interest as well as from considerations more humane—a sailor who is hurt or sick at sea or in a foreign port obviously cannot be put off the ship or allowed to starve on the ship. What is there about this right which excludes the seaman from the operation of other rules of law which are available to others both at sea and on shore? In what possible way does the right to maintenance and cure conflict with the right to indemnity for injuries? No such conflict has been encountered in according the seaman redress for conditions amounting to unseaworthiness, or for injuries due to negligence—now that the fellow servant rule has been swept away by statute. None apparently is found if he is assaulted by his captain (Petitioners' Brief, p. 157), but if it so happens that the assault is committed by some other officer, the suggestion is that the seaman's right under maritime law to maintenance and cure excludes the right to receive compensatory damages, which could otherwise be exacted through the rule *respondeat superior,* and constitutes everything to which he can be entitled. No reason for this eccentric exception to the operation of the rule *respondeat superior* is suggested, and the argument that any obstacle to the operation of that principle of responsibility is found in the law of

maintenance and cure is without the countenance of a single decision.

It is said, however, that the expressions of this court in the case of *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 380, indicate that a seaman has no right to sue his employer for assault committed by a superior officer in the course of the officer's employment. That expression falls far short of laying it down that the rule *respondeat superior* is subject to the exception which is now urged. The case was a negligence case. It arose before the Merchant Marine Act of 1920, and the expression referred to related to the controversy as to the construction of the prior enactment, the LaFollette Act of 1915, in particular the provision: "Seamen having command shall not be held to be fellow servants with those under their authority." The plaintiff contended that that act eliminated the fellow servant rule and so entitled the plaintiff to recover. The defendant argued that the scope of the provision in the LaFollette Act was much narrower; that it really intended merely to state that masters of vessels were not fellow servants of seamen. The Court adopted the latter and stricter construction, holding that:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore."

Even so, the case was close; three justices dissented and Mr. Justice Holmes concurred in result only. Moreover, the *Chelentis* case has virtually been superseded by the enactment of the Merchant Marine Act of 1920, and by the decision of this Court in *Panama R. R. Co.* v. *Johnson*,

264 U. S. 375, 389, in which this Court interpreted the later statute and held that it did contemplate introducing into cases of personal injuries to seamen arising under the maritime law the obligations and liabilities, the rights and rules which had not been invoked by the LaFollette Act.

The Osceola, 189 U. S. 158, which is much relied on by the petitioners, is a strong authority against their contention. The remark to which counsel calls attention (Petitioners' brief, pp. 11-12), is as follows (italics ours):

> "* * * None such is given in the admiralty court jurisdiction act of 1861, although it seems an action in admiralty will lie against the master *in personam* for an assault committed *upon a passenger or seaman.*"

If this remark is to sustain the inference that this Court ruled that no action could be brought by a seaman against the employing owner for assault committed by an officer, it obviously has a like implication as to an assault upon a passenger.

Yet it is certain that the petitioners' counsel will not claim that an assault committed by a ship's officer in the course of his employment upon a passenger would not justify an action against the ship-owner as employer of the offending employee. Moreover, if this Court had intended to hold that all actions brought by an employee for an assault made upon him by a superior were barred, the Court, it would seem, would have said just that. Instead the Court limited its pronouncement to negligence actions. In all its reasoning, and in formally stating its conclusions, the Court invariably limited its statement of the cases in which the injured seaman could not recover to instances of injury through negligence.

Finally, even in denying to seamen the right to indemnity in the case of an injury due to negligence the Court in the *Osceola* opinion relied not on any principle peculiar to admiralty law but on the fellow servant rule of the common law—we find no statement that the principle *respondeat superior* does not apply in such a case but instead the adoption of a common law exception to the operation of that principle. It is clear, therefore, that there is no principle of maritime law—either general or specially limited to defeat a seaman's claim—which precludes the operation of *respondeat superior.*

B.

The second reason advanced for the claim of immunity is the contention that the fellow servant rule applies not only to negligence cases but to those of wilful assaults as well. This contention is negatived by a weight of authority federal and state, common law and maritime, so overwhelming as to constitute a virtual unanimity. Not only is the fellow servant rule invariably stated as applying to negligence cases only but it is restricted to such cases and is not an obstacle to recovery in an action against the employer brought by an employee injured not inadvertently but by the wilful act of his superior.

Wolfe vs. *Thomas,* 268 Fed. 464, 467;
Memphis & N. Packet Co. vs. *Hill,* 122 Fed. 246;
The General Rucker, 35 Fed. 152;
The Vueltabajo, 163 Fed. 594;
Gabrielson vs. *Waydell,* 67 Fed. 342;
Richard vs. *Amoskeag Mfg. Co.,* 109 Atl. 88 (N. H.) s. c. 8 A. L. R. 1426;
Palos Coal & Coke Co. vs. *Benson,* 145 Ala. 664, 39 So. 727;

Panama Ry. Co. v. *Johnson,* 264 U. S. 375;
Avondale Mills vs. *Bryant,* 10 Ala. App. 507, 63 So. 932;
Jebeles-Colias Confectionery Co. vs. *Booze,* 181 Ala. 456, 62 So. 12;
Tillar vs. *Reynolds,* 96 Ark. 358; 131 S. W. 969; 30 L. R. A., N. S. 1043;
Roberts vs. *Southern R. R. Co.,* 143 N. C. 176, 55 S. E. 509; 8 L. R. A., N. S. 798;
Fleming vs. *Tarboro Knitting Mills,* 161 N. C. 436, 77 S. E. 309;
Rogahn vs. *Moore Mfg. Co.,* 79 Wis. 573, 48 N. W. 669.

All of the decisions above cited necessarily involve the exclusion of the application of the fellow servant rule from the case of a wilful assault. In the case of *Memphis & N. Packet Co.* vs. *Hill* (*supra*), the defendant urged the fellow servant rule as an objection to the plaintiff's judgment. The Circuit Court of Appeals for the Eighth Circuit expressly held in that case that the fellow servant rule had no application to the case of a wilful assault. The Court in its opinion, Judge Thayer writing, after alluding to the contention that the fellow servant rule was applicable, said (122 Fed. at 247):

> "But this doctrine, we think, has no application to the case in hand. The injuries complained of by libellant were not occasioned by the negligent act of Wright while he and the libellant were working side by side as fellow servants, but they were wilfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that

> office had the same power to give orders to the deck hands and direct them in what to do as the mate."

But one determination of any court of review applying the fellow servant rule in a case of wilful assault has come to our attention, viz., the case of *Gabrielson* v. *Waydell*, 135 N. Y. 1, now repudiated (*Encarnacion* v. *Jamison*, 251 N. Y. 218) by the court which decided it, and also by petitioners (Petitioners' Brief, p. 15). Even in that now overruled decision the error was inadvertent and without discussion.

Finally if the term "negligence" in the *Osceola* and other decisions stating and applying the fellow servant rule means wilful assault as well, it has a like inclusiveness in the Federal Employers' Liability Act extended to seamen by Section 33 of the Merchant Marine Act of 1920. We believe "negligence" means "negligence" in both places, but if it means wilful act also in the decisions which those statutes were intended to supersede it has a like import in the remedial legislation which employed the same terminology.

Counsel argues (Brief, p. 14) that the propositions laid down in the *Osceola* respecting negligence were intended (by implication) to be "a complete statement of the rights * * * of seamen, * * * for injuries sustained in the navigation of the vessel". Why? The Court does not say so. The Court had in mind the distinction between assault and negligence, for the opinion elsewhere refers, as we have noted, to early cases relating to assault. Yet assault is not included in the formulation of principles. Even counsel does not persist in this contention for although the *Osceola* permits the seaman no recovery for the negligent fault of the Captain (*Osceola* Proposition 4, see Petitioners' Brief, p. 13), counsel concedes that for a wilful assault

by the Captain the seaman could recover from the employer (Petitioners' Brief, p. 15).

The scarcity of early cases (Petitioners' Brief, p. 17) is because the development of the rule *respondeat superior* is recent. The same scarcity is to be noted in the field of actions by third persons against the employer for assaults committed by the employee (26 Cyc., 1527). Professor Wigmore in a series of articles ("Responsibility for tortious acts; its history.") in 7 Harv. Law Rev. 383 *et seq.* notes that in our late medieval and modern jurisprudence there have been three stages, viz.:

(1) The test of the particular command—employer not liable unless he directed the doing of the very act complained of;

(2) The test of the command implied from the general authority;

(3) The test of the scope of employment.

The last of these tests did not come to dominate this field until about 1800, and cases considerably later than that date are found not infrequently which apply the earlier test, *e. g.*:

Mali vs. *Lord*, 39 N. Y. 381.

In that case the defendants, merchants, were held not responsible for the act of their superintendent in causing the unjustified arrest and search of a customer suspected of shoplifting. The reporter's head-note contains the following:

> "While the master is responsible, civilly, for the fraud, negligence, or other wrongful acts of his servant committed in the transaction of his business, he is not responsible for the wilful injury committed by the servant while so engaged, unless he so acted by the express or implied authority of his employer".

As a matter of fact, however, the principle *respondeat superior* appears to have been recognized in the maritime courts as available to a seaman assaulted by a superior even earlier than the period of its general recognition in the common law courts. Thus in the case of *The Ruckers* (4 Rob. Ad. Rep. 60), a passenger libelled the ship for an assault made upon him by the master, *"and as it was conceded that the proceeding would have been upheld if it had been the case of an assault upon a seaman,* it was insisted that a passenger was entitled to the same remedy and it was so held by Sir William Scott" (Dissenting opinion per Maynard, J., in *Gabrielson* v. *Waydell,* 135 N. Y., at 18).

The cases cited on pp. 8-9, *ante,* and on pp. 15-18, *post,* disclose the greater scope of the employer's responsibility according to the view which now prevails.

POINT II.

The Corporal Punishment Act obviously has no bearing upon the case favorable to the petitioners and certainly affords no implication upon which the denial to a seaman of redress for a wilful assault can be predicated.

Petitioners' argument based upon this statute, last amended on March 4, 1915, cannot withstand the most superficial examination. The statute in certain circumstances creates a liability against the owner, captain, etc., irrespective of any question as to the scope of employment. It gives a lien against the vessel. It certainly does not by implication repeal or outlaw any right that existed on March 4, 1915 much less does it limit the effect of the later Merchant Marine Act of 1920. Counsel can hardly ex-

pect the suggestion that Congress provided this remedy in view of the non-liability of owners under the maritime law (Petitioners' Brief, p. 21) to be taken seriously.

POINT III.

The evidence was clearly sufficient to establish that the second assistant engineer, when he struck plaintiff, was acting in pursuance of his employment.

The question whether the subordinate in committing the particular act complained of was acting within the scope of his employment is ordinarily one of fact. The question in its elements is not unlike the question of proximate cause, *i. e.* as to whether the purpose of the employment, the effort of the superior servant to get the results expected of him was the cause, rather than any private quarrel, of the assault. That this question as to scope of employment was one of fact in this case is clear from the decisions already cited.

All of those cases were cases of assault upon one employee by another. All of them, possibly excepting *Wolfe* vs. *Thomas*, 268 Fed. 464, and *The Vueltabajo*, 163 Fed. 594, in which the assault was committed by the captain, are clearly in point, to the effect that Jackson's act falls within the scope of his employment as an officer of the *Alpha* and an employee of the defendants. We shall not repeat the evidence at length. It suffices to recall that Jackson and Cain were both required to be on duty at the time when the assault actually occurred and that Jackson was in charge. Jackson had just come from the engine room and was attempting to secure a full engine room crew which was lacking because of Cain's absence. Jackson accordingly

went after Cain, hollering to him to come down (pp. 274-5, fols. 820-4). Jackson struck him for the purpose of compelling his attendance, of punishing him for his failure to report on time, and to insure compliance with the ship's routine both on his part and on the part of others of the engine room force. Jackson says he was going to get a wiper to do Cain's watch (p. 298; fol. 893), and there was a wiper sitting up on deck by the engine-room housing (p. 275; fol. 825), yet, when Cain ran from him Jackson followed until he reached Cain in the salon where his wound was being dressed (p. 276; fols. 827-8). From all the facts, the jury were fully justified in drawing the inference that Jackson was attempting to exercise effectually his authority, to perform the functions as an officer for which he was employed, and in particular to get his engine room manned fully for the expected departure of the ship.

The situation shown at bar was certainly as indicative of Jackson's functioning as an employee as were the corresponding facts in the case of *The General Rucker, Memphis & N. Packet Co.* vs. *Hill,* and in all of the State Court decisions which we have cited. These decisions and the quotations from certain of the opinions as well as from the opinion of the Supreme Court of Canada in the case of *Hudson Bay* vs. *Vaillaincourt,* 2 Dom. L. R. N. S. 1008, disclose *that whether a servant is acting within the scope of his employment does depend "not upon the question whether the master authorized the offending employee to use force, but upon the question whether the latter used the force complained of as a means of doing what he was employed to do" (Richard vs. Amoskeag Mfg. Co.,* 8 A. L. R., at 1429). These decisions and expressions of opinion also make clear that the offending act is not taken out of the scope of the

servant's employment either because of its criminal character—it was a crime in every one of the cases cited—or because it was not authorized or ratified by the employer, or because it was accompanied by a display of temper.

Besides the cases which we have cited in actions between master and servant we may resort in determining the question as to scope of employment to cases of third persons assaulted by the servants of the defendant. So far as regards scope of employment and the application of the rule *respondeat superior*, the question is the same whether the person injured by the offender's wrongful act is one of his co-servants or a stranger. It may be that in fact quarrels between persons in the intimacy of common employment are more frequent and present, in a larger proportion of cases, a troublesome question of fact as to whether the employee committing the wrongful act was proceeding in a private quarrel or trying to carry out the functions of his employment. The question of law remains the same. An examination of the cases in which a stranger to the employment has sued the employer in consequence of an assault committed by an employee discloses the statement and application of precisely the same rule as regards what does, and does not fall within the scope of the offender's employment. We call the Court's attention to the following typical cases:

Chesapeake, etc. R. R. Co. vs. *Stojanowski*, 198 Fed. 77 (2nd Circuit);

Phila. & Reading R. Co. vs. *Derby*, 14 Howard, 468, 486;

Steamboat Co. vs. *Brockett*, 121 U. S. 637, 645;

Magar vs. *Hammond*, 183 N. Y. 387, 390-1.

To the same effect are the English cases, *e. g.*:

Bayley vs. *Manchester, etc. R. Co.*, L. R. 8 C. P. 148, 28 L. T. 366;

Dyer vs. *Munday*, 64 L. J. Q. B. 448 (1895), 72 L. T. 448.

In *Steamboat Company* vs. *Brockett* (*supra*), the United States Supreme Court, Mr. Justice Harlan writing, said (121 U. S. at 645):

> "Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, 'if,' as was adjudged in Philadelphia & Reading Railroad *vs.* Derby, 14 How. 468, 486, 'it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment'."

The English cases apply the same test as to the application of the rule *respondeat superior*. In *Dyer* vs. *Munday* (*supra*), the defendant's business was that of selling furniture on "the hire-purchase system". The purchaser of a bedstead from defendant had left it at plaintiff's lodging house as security for arrears of rent. One of defendant's employees going to the lodging house to recover possession of the bedstead assaulted the plaintiff. For the assault he was convicted and sentenced to pay a fine, which he did. In the civil action the Court of Appeals held the defendant employer liable. The Master of the Rolls (Lord Esher) in his opinion said (italics ours):

"The fact that what was done was a criminal offense may be material for the consideration of the jury, but the mere fact that it was a criminal offense does not take the case out of the general rule. *The question is not whether the act was within the authority of the servant.* The authority of the servant is to do what he is told and to do it properly. But the law says that if a man, who is employed to do a thing properly, in the course of his employment exceeds his authority, then the master is liable. The law has always been so laid down" (Opinion, 72 L. T., at p. 449).

Lopez, L. J., said in the same case:

"It is perfectly clear that the question whether acts are, in fact, within the scope of the employment of a servant, is one for the jury, but that the question whether the particular acts can be within the scope of the employment is for the judge. • • • Now the law is, that all acts of a servant done in the course of his employment, and in furtherance of the employment, and in the master's interest, are within the scope of the servant's employment, and that the master is liable for such acts, although they may be contrary to his express orders, and amount to a criminal offense" (*id.*).

All three of the justices constituting the Court of Appeals cited, with approval, the case of *Bayley* vs. *Manchester, etc., R. Co.* (*supra*), in which the railroad was held liable for the act of a porter in wrongfully removing a passenger from his compartment and putting him off the train. The overwhelming weight of authority is in agreement with these cases and with the authorities which we have cited in the previous point.

We call attention to a clear statement of the same rule by the New York Court of Appeals in *Magar* v. *Hammond*, *supra*. In that case the Court said, Chief Judge Cullen writing (183 N. Y. at 390-1):

> "To render the defendant Hammond liable for the willful, reckless or wanton act of Tompkins, the act must have been done by Tompkins in the scope of his employment, and whether it was so done should be submitted as a question of fact to the jury. (Craven *v.* Bloomingdale, 171 N. Y. 439.) If Tompkins, not having the interests or services of his master in mind, and acting maliciously or in order to effect some purpose of his own, shot the plaintiff, then his master, the defendant Hammond, is not liable for the act; but if his act was within the general scope of his employment and done with a view to the furtherance of his master's business, then Hammond is liable whether the act was wilful, wanton or reckless."

CONCLUSION.

There is no basis presented in support of the application which justifies a further review or a longer postponement of the enforcement of the plaintiff's judgment. The application should be denied.

Respectfully submitted,

MELVILLE J. FRANCE,
Counsel for Respondent.

THOMAS J. CUFF,
VINE H. SMITH,
Of Counsel.

FILE COPY

APR

Supreme Court of the United States

OCTOBER, 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER AND FRANK DALY, copartners doing business under the firm name and style of Walker & Daly,

Petitioners,

against

ROBERT CAIN,

Respondent.

BRIEF FOR RESPONDENT.

THOMAS J. CUFF,
Attorney for Respondent.

VINE H. SMITH,
MILTON PINKUS,
DIX W. NOEL,
of Counsel.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

TABLE OF CONTENTS.

	PAGE
STATEMENT	1
SUMMARY OF PLEADINGS AND ISSUES	2
FACTS	4
ARGUMENT:	
POINT I. The civil responsibility of the petitioners under the rule *respondeat superior* for the assault which their employee Jackson committed while acting in the course of his employment is established by authority, is not dependent upon statute and is founded upon unassailable principles	10
POINT II. Assuming that prior to the enactment of the Merchant Marine Act of 1920, the employer, upon such facts as are presented at bar, might have avoided liability by invoking either the fellow-servant rule or an exception to the operation of the rule *respondeat superior*, it is manifest that the operation of that statute is fatal to both of these defenses and that the petitioners are now liable under these Statutes, if they were not before, for indemnity to the same extent as if the employment had been non-maritime, and the action governed by the principles applicable on land	28
POINT III. The evidence established that Jackson, in committing the assault upon respondent, was acting within the scope of his employment	32

PAGE

POINT IV. Petitioners' suggestion that liability on their part for the assault is excluded by the corporal punishment statute (Title 46, Section 712, United States Code Annotated) involves a forced construction and extension of that statute and is plainly untenable..... 37

CONCLUSION—The Judgment should be affirmed..... 38

AUTHORITIES CITED.

A. STATUTES:

Corporal Punishment Statute (U. S. C. A., Title 46, Sec. 712)..... 4, 37

Merchant Marine Act of 1920 (41 Stat. 107, U. S. C. A., Title 46, Sec. 688).....18, 19, 29, 31, 37

La Follette Act of 1915 (Act of March 4th, 1915, 38 Stat. 1164)..... 19

Federal Employers' Liability Act (U. S. C. A., Title 45, Sec. 51, Apr. 22, 1908, 35 Stat. 65), 20, 29, 30, 31

B. DECISIONS:

Atlantic, The, Abb. Adm. 451..... 17

Avondale Mills *v.* Bryant, 10 Ala. App. 507..... 21

Bayley *v.* Manchester, etc., R. Co., 28 L. T. 366 34, 36

Carlisle Packing Co. *v.* Sandanger, 259 U. S. 255 16

Chelentis *v.* Luckenbach S. S. Co., 247 U. S. 372 19

Chesapeake, etc., R. R. Co. *v.* Stojanowski, 198 Fed. 77 34

Craven *v.* Bloomingdale, 171 N. Y. 439..... 37

PAGE

Dyer *v.* Munday, 72 L. T. 448 ..... 34, 35

Encarnacion *v.* Jamison, 251 N. Y. 218 31

Fleming *v.* Tarboro Knitting Mills, 161 N. C. 436 ..... 21, 24

Gabrielson *v.* Waydell, 67 Fed. 342 21

General Rucker, The (Hall *v.* Sims), 35 Fed. 152 ..... 21, 33

Hall *v.* Sims (*General Rucker, The*), 35 Fed. 152 ..... 21, 33

Hedley *v.* Pinkney & Sons Co., 1894 A. C. 222, 13, 16

Hudson Bay *v.* Vaillaincourt, 2 Dom. L. R. N. S. 33

International Stevedoring Co. *v.* Haverty, 272 U. S. 50 ..... 20, 29, 31

Jebeles-Colias Confectionery Co. *v.* Booze, 181 Ala. 456 ..... 21, 33

Johnson *v.* Lindsay, 1891 A. C. 371 17

Leon, The, 50 L. J. Adm. 59, 6 P. D. 148 13

Mayor *v.* Hammond, 183 N. Y. 387 ..... 34, 36

Mali *v.* Lord, 39 N. Y. 381 23

Memphis & N. Packet Co. *v.* Hill, 122 Fed. 246 ..... 21, 33

Mo., Kans. & Tex. Ry. *v.* Wulf, 226 U. S. 570 31

M. Moxham, The, 1 P. O. 107 ..... 13, 15

Osceola, The, 189 U. S. 158 ..... 16, 19, 20

Pacific S. S. Co. *v.* Peterson, 278 U. S. 130 18

Palos Coal & Coke Co. *v.* Benson, 145 Ala. 664 21

Panama R. R. Co. v. Johnson, 264 U. S. 375, 18, 20, 29

Philadelphia & Reading R. Co. *v.* Dirby, 14 How. 468 34

Plymouth, The, 3 Wall. 20 13

PAGE

Richard *v.* Amoskeag Mfg. Co., 109 Atl. 88, 14 A. L. R. 1426 ..... 21, 25, 33
Roberts *v.* So. R. R. Co., 143 N. C. 176 21
Rogahn *v.* Moore Mfg. Co., 79 Wis. 573 21
Second Employers' Liability Cases, 223 U. S. 1, 53 32
Smith *v.* Steele, 44 L. J. Q. B. 60 ..... 13, 15
Spencer *v.* Kelley, 32 Fed. 838 ..... 21, 32
Steamboat Co. *v.* Brockett, 121 U. S. 637 ..... 34, 35
Tillar *v.* Reynolds, 96 Ark. 358 21
Vasey *v.* Mayor, etc., of Baltimore (*The F. C. Latrobe*), 28 Fed. 377 ..... 13, 14
Vueltabajo, The, 163 Fed. 594 ..... 21, 32
Wilson *v.* Merry, 2 R. I. H. L. So. 326 17
Wolfe *v.* Thomas, 268 Fed. 464 21
Workman *v.* New York City, Mayor, etc., 179 U. S. 552 13

C. TEXT-BOOKS:

26 Cyc. 1527 23
36 Cyc. 1143 27

D. LAW REVIEW ARTICLES:

Common Law Courts and the Law of the Sea, 36 Harv. Law Review 777 16
Extension, The, of the Fellow Servant Doctrine to Admiralty, 18 Harv. Law Review 294 16
Liability in the Admiralty for Injuries to Seamen, 19 Harv. Law Review 418 ..... 17, 27
Respondeat Superior in Admiralty, 19 Harv. Law Review 445 16
Wigmore, Series of Articles, 7 Harv. Law Review 383, *et seq* 23

Supreme Court of the United States

OCTOBER, 1929

No. 457

ALPHA STEAMSHIP CORPORATION, WILLIAM H. A. WALKER and FRANK DALY, copartners doing business under the firm name and style of Walker & Daly,

Petitioners,

against

ROBERT CAIN,

Respondent.

BRIEF FOR RESPONDENT.

Statement.

Numerical references in this brief designate pages of the transcript of record unless otherwise indicated.

The writ of certiorari herein brings before this Court for review a decree of the Circuit Court of Appeals for the Second Circuit, entered August 27, 1929 (366-7) affirming a judgment of the District Court for the Southern District of New York, entered on January 3, 1929 (13-14) after trial before Honorable Julian Mack, Circuit Judge, and a jury.

The copy of the judgment of the District Court appearing in the record is for a total of $12,867.50 (13-14).

This is erroneous in reciting and assuming that the verdict was for $12,500.00 whereas the verdict actually rendered was $12,000.00 (342). This difference of $500, together with the interest thereon, makes the total difference of $508.50 between the erroneous amount and the correct amount. The correct amount $12,359.00, appears in the petitioners' notice of appeal to the Circuit Court of Appeals (346).

The action was brought and the judgment recovered for damages sustained by respondent in consequence of an assault upon him, while he was employed by petitioners as a fireman on their American oil tanker the steamship *Alpha* (1, 2), committed by one Jackson, who was petitioners' second assistant engineer and respondent's superior officer (24-5).

Pleadings and Issues.

It was alleged in the complaint and admitted either on the pleadings or tacitly at the trial that the respondent at the time of the assault was in the employ of the petitioners as a seaman (fireman) on the steamship *Alpha* operated by the petitioners (2, 6, 7, 18, 136); that Jackson, who committed the assault, was at that time also in the employ of the petitioners as second assistant engineer of the vessel; that as such second assistant engineer he was respondent's superior and was, in fact, at the time of the assault (about one A. M. on the morning of February 6, 1927) in charge of the engine room watch which began at midnight on the fifth and terminated at four A. M. on the sixth (98, 203). It was further undisputed that previously to the assault there was no ill feeling and no quarrel between the respondent and his superior, Jackson (229).

The principal, and practically the only controverted issue of fact was whether Jackson did commit the assault. A further issue submitted to the jury was as to whether if Jackson did commit the assault he was acting at the time in the course and furtherance of his employment. The complaint alleged in all, six causes of action. Of these, all but two were either withdrawn by the respondent or dismissed by the court. The cause of action upon which recovery was had was the first, which alleged in substance that Jackson, while acting in the course of his employment as second assistant engineer of the vessel, struck plaintiff over the left eye with a wrench or other metal instrument, destroying the vision of the eye (2).

It is appropriate to refer to two of the other causes of action. In the second cause of action it was alleged that the petitioners negligently failed to protect respondent from assault by Jackson although they "had knowledge of the circumstances in ample time so to do" (3). In support of this cause of action, evidence was introduced to the effect that Jackson for a period of at least ten hours immediately prior to the assault had been in a condition of intoxication and obviously unfit for duty, and that the captain was or should have been aware of his condition (107-8, 109-110). Upon this cause of action the jury disagreed (341-2).

In the fifth cause of action respondent alleged the failure of the captain to enter in the official log book of the vessel a statement of the assault by Jackson and to report the assault and to surrender Jackson to the proper authorities when the vessel reached the port of New York, and alleged that by reason of such neglect Jackson had escaped (4). It was further alleged that such neglect and escape constituted a violation of the provisions of the Federal

Statutes which forbid flogging and corporal punishment—U. S. Code, Title 46, Section 702, 712 (4-5). This cause of action was dismissed (126, 129-30, 292). The Trial Court dismissed this cause of action on the ground either that omitting to report Jackson and allowing him to leave the jurisdiction of the port—and apparently the country (128, 232)—did not constitute an escape under the statute (129, 292), or that the statute contemplated an indemnity for the consequences not of the assault, but only of the escape.

In view of the determination below we shall summarize the facts material to the first cause of action upon which respondent has prevailed.

Facts.

Respondent, a British seaman (17), between 12:40 and 1 o'clock in the morning of February 6, 1927, while employed by petitioners as a fireman on their oil tanker *Alpha*, was struck twice by his superior officer, one Jackson, the second assistant engineer, with a monkey wrench, as a result of which assault respondent has permanently lost the vision of his left eye (23-5, 29, 69-70, 89-90). The assault was committed upon the deck of the vessel which was then lying in the harbor of Port Amuey, Venezuela, preparing to clear for her return voyage (24-5). [The correct name of this port does not appear in the transcript of record. We take it from petitioners' brief, p. 2.]

It is to be noted that, according to the testimony on both sides, the *Alpha* was preparing to put to sea with many of its personnel the worse for liquor (26-7, 63, 104, 107-10, 136, 240-1, 303, 306). Jackson, himself, testified to the effect that the ship was preparing to leave within the next hour or two (198, 203-4, 232-3).

Jackson, at the time of the assault, was in charge of the engine room and fire room and in command of the engine room personnel (198, 203, 208). The respondent was the fireman assigned to the twelve to four watch and it was, of course, likewise his period of duty (203).

Respondent had stood an extra watch the day before (20, 285), and had then gone ashore. He had returned to the ship at about half past four in the afternoon, eaten his supper and a little later had gone to bed (23). He was called at eleven-thirty and answered, but fell asleep again, and woke at about twenty minutes past twelve. He then rose, dressed, went to the saloon and drank a cup of coffee, then started to descend the stairs leading down to the engine room. He got to the second grating, where he met the first assistant engineer, who was intoxicated (24, 26, 40-41). The first assistant reprimanded respondent sharply for being late, and struck him twice with his fist (24). The respondent, an unusually small man (41), freed himself and went up the ladder to the top grating. He turned then and looked down and saw that the first assistant was not pursuing him. He stepped out on the deck, then came back and looked down to the engine room, where he saw the first and second assistants in conversation, the first pointing upward toward the respondent (24). Thereupon, the second assistant started climbing up the ladder.

Respondent's testimony as to this occurrence, and as to what immediately ensued, is as follows:

> "He pointed up towards me and then the next thing I seen the second assistant coming up. He came all the way up and spoke to me and he said, 'What to do with you?'.
>
> Q. That means 'What is the matter?' is that right? A. I don't know what is the matter with him;

I wanted to know what is the matter with the first engineer, the first assistant. That is what I said to him. I said to him, 'I don't know what is the matter with me, what is the matter with the first assistant?' He told me I was a bit late. I says to him, 'Yes, I am a bit late, I overslept'. And he said, 'Late be damned', and he says to me and struck me across the head with a monkey wrench. I fell back like this (indicating), and as I fell back like that, he tapped me over the eye with the monkey wrench. I fell again, right on the deck and then I got up and I run on my knees and hands away from him. I got over to the starboard side of the boat, running around the stern, and I got over to the starboard side, and on the starboard side, I met the steward. He said, 'What is the matter?' I kept running on and looking back to see if the second assistant was following me. When I was running along and looking back to see if he was following me, I tripped over a steel casing. I picked myself up again and started to run to the captain's room. I got inside the captain's room and I said to the captain, 'The second assistant engineer has struck me with a monkey wrench.' The captain took me down to the salon, and got me down there, and he dressed me, and while we were in there and he dressed me, the first and second assistants came in * * *.

Well, when I was in there being dressed by the captain, the first and second assistants came in, and I pointed to the second assistant and I told the captain, 'There is the man that done that', pointing to the second assistant.'

The captain chased the first and second assistants right out of the salon; he chased them both out of the salon. Then he dressed me up, and chased me forward. He dressed my head and my eye and sent me forward with two men to help me.

Q. And you went into your bunk, did you? A. Yes, sir" (24-6).

The respondent testified that when the second assistant came up the stairway, he had a monkey wrench in his left hand and a flashlight in his right, and he came up staggering and swaying from side to side (26). He testified that the second assistant was drunk at the time, and that as he followed the respondent, he said: "I will teach you to go down on your watch, you bastard" (26-7). He also testified that at no time when he fell did he hit his eye or head, but only his arms and leg, and that the place where he tripped over the steel casing was not near to the second assistant (27-8).

The reference in the testimony above quoted to "seeing the steward" on the deck at the point of the assault (25) is a mistake. The word "steward" should read Stewart, the name of a seaman who was on the deck near the point where the assault occurred.

Stewart, a young man residing in Miami, Florida, in the home of his father and mother, was on the *Alpha* as an ordinary seaman. He did not see the assault, but saw both Cain and Jackson immediately afterward. He testified to what he saw as follows:

> "Well, as I was sitting at the corner of the hatch, I saw Cain come around the corner aft of the deck house, the engine room, and I looked up and I saw he was running. His face and shirt was covered with blood, and in a few moments, right behind him, came Jackson, the second assistant. Jackson had in his hand a monkey wrench and a flashlight in each hand * * * the flashlight in the right hand and the monkey wrench in the left hand, and as Cain went by me, I hollered to him, 'What is the matter?'

and he didn't answer, and just at that moment Jackson popped up around the corner and said 'Stop him!'. I said 'What is the matter with him?' He said, 'I will teach him to (get) down on watch', and he was cursing him, using curse words" (104-5).

After the *Alpha* had left New York on her next voyage, Stewart, who was still a member of the crew of the *Alpha*, signed a statement (Defendant's Exhibit B—112-3, 344-5). This statement was not taken on February sixth, the day of its date, but on March fourteenth or fifteenth following, apparently after the ship had completed the subsequent voyage. This statement was put in evidence by the petitioners—for what reason, is not clear. It is in precise accord with the testimony given by the witness at the trial. It does not contain any mention of the fact that the second assistant engineer was drunk, but Stewart explained that he was not asked anything on that point and that the statement was made up simply of questions put to him by someone at the instance of the ship, and his answers.

Jackson, himself, testified that after a conversation with the first assistant, he ascended the ladder to the deck where respondent stood. Jackson said, referring to the time when he was ascending the ladder, "I hollered to him to come on down" (198). Jackson said his purpose was to get a wiper to act as fireman in place of respondent, but it is to be noted that he shouted to respondent to come down, and even, when he got to the top, instead of ordering the wiper who sat there to go down on duty and take Cain's watch, he continued to follow respondent (199) until he came to the saloon where the captain was dressing the wound, where he first learned how badly respondent was hurt (220). It was not until respondent was relieved of duty

and sent to bed that Jackson directed the wiper to report and stand respondent's watch. The witness testified that Cain and he worked the same watch from twelve to four (228). He further testified that he and the respondent were not on bad terms, and that he had nothing against the respondent, and, so far as he knew, the respondent had nothing against him (229), and in all that Jackson did, and in all that he said, he was acting not by reason of any malice but in the performance of his duty (231-4).

Notwithstanding the number of witnesses who testified, the only important question of credibility was that presented by respondent's testimony that Jackson struck him with the wrench and Jackson's denial of having done so.

The case was submitted to the jury on the first and second causes of action. It was submitted in a very clear and careful charge. One issue was common in each of the two causes of action, *i. e.*, as to whether Jackson had committed the assault as alleged. The only other issue as to the first cause of action was whether or not he committed the assault while acting as petitioners' employee and respondent's superior, the second assistant engineer.

The jury having determined these issues in favor of respondent, it is submitted, for the reasons set forth under the following points, that none of the objections of the petitioners to the judgment under review are valid and that that judgment should be affirmed.

POINT I.

The civil responsibility of the petitioners under the rule *respondeat superior* for the assault which their employee Jackson committed while acting in the course of his employment is established by authority, is not dependent upon statute and is founded upon unassailable principles.

The contention that petitioners' responsibility is barred by a narrow admiralty exception to the rule *respondeat superior* or by a surviving vestige of the fellow servant rule is sheer special pleading, unsupported by authority, contrary to well considered decisions, and utterly devoid of intrinsic merit. Upon this review petitioners rely principally upon the contention that the rule *respondeat superior* is not and has never been a part of the maritime law so far as concerns the liability of the employer for indemnity to a seaman injured through the fault, whether negligent or wilful, of any other member of the crew, including the officers and the master. As to the master, petitioners do indeed concede the existence of a duty to protect the seaman but they insist that this is a part of the seaman's contract with his employer, with the necessary result that an assault by the master or an assault which the master unreasonably or negligently fails to prevent (or which he afterwards "ratifies") gives rise to a liability on the part of the employing owner or other employer, but on the ground not of the application of the rule *respondeat superior*, but of a breach of the employer's contractual warranty of good treatment, a basis very similar to that upon which is rested recovery of damages for failure on the

part of the ship to care properly for a seaman who has become sick or disabled.

Before calling attention to the decisions and reasons which disclose the petitioners' position as both contrary to precedent and unsound in principle, it is appropriate to observe the eccentric result to which their contention leads. First of all, counsel assumes, and the overwhelming preponderance of authority is clear, that if this assault had taken place on shore or under circumstances governed by non-maritime law, the rule *respondeat superior* would apply. He further assumes that if the injury had occurred, as it did, in the maritime jurisdiction but had been done inadvertently and negligently, the rule *respondeat superior* (now that the fellow servant rule has been swept away by statute), would likewise have applied, and even though it were a wilful assault and committed on shipboard, petitioners concede a right to indemnity from the employer if the assault was committed by the captain. This proposition is, then, that the respondent is defeated by the concurrence of three conditions: (a) that the injury was wilful rather than negligent; (b) that the rights and liabilities growing out of this injury are governed by maritime rather than by non-maritime law; (c) that the fault is that of some employe other than the captain.

For the following specific reasons the petitioners' contentions are opposed to authority and indefensible in principle:

1. The principle *respondeat superior* is of universal application and is a part of the maritime as well as of the common law.

There is, of course, nothing in the maritime law as distinguished from the common law or in maritime relations

as distinguished from others, which precludes the operation of the rule *respondeat superior*. The operation of that rule is manifest in the responsibility of carriers by sea for the acts of their representatives which is broadly parallel to the like responsibility of carriers on land. The operation of the rule *respondeat superior* is likewise apparent in the general responsibility of operators of ships for the torts committed by their employes to whom the actual functions of operation are entrusted.

Nor is the similar operation of the rule *respondeat superior* in both the maritime and non-maritime jurisdictions an instance of a legal principle becoming "amphibious". It is not even necessarily an instance of one jurisdiction borrowing from the other. It is, rather, the operation, in the different courts administering the law in each jurisdiction, of the same principle of responsibility. To say this is, of course, not to deny that decisions in each of these jurisdictions have been powerfully influenced by those of the other. The same interplay and development of the law of different jurisdictions in contact with each other is seen in the progress of equitable principles in controversies tried at common law and before common law courts. The same tendency is further observable when the equity jurisdiction itself follows legal analogies. Without pretending to exhaustive study, we believe a detailed comparison of the growth of common law, civil law, and ecclesiastical law rules would disclose to a greater or less extent a similar interaction.

But whatever the origin of the rule *respondeat superior*, whether it be a principle of maritime law which has established a habitat on shore and made its way into the system of the common law, or is really originally a shore product which has become "amphibious", the testimony of the deci-

sions both in this country and in England is clear and uniform to the effect that the principle is a part of the maritime law.

Workman v. *New York City, Mayor, etc.*, 179 U. S. 552;
The Plymouth, 3 Wall. 20, 35;
Vasey v. *Mayor, etc., of Baltimore* (The F. C. Latrobe), 28 Fed. 377, 378-9;
The M. Moxham, 1 P. D. 107, 110, 113, 114;
The Leon, 50 L. J. Adm. 59, 6 P. D. 148;
Smith v. *Steele*, 44 L. J. Q. B. 60;
Hedley v. *Pinkney & Sons Co.*, A. C. 222, 1894.

The case of *Workman* v. *New York City, Mayor, etc.* (*supra*), was a libel *in personam* brought by the owner of a British barkentine which in June, 1893, while moored to a pier in the East River, was struck by a steam fire boat belonging to and operated by the City of New York. This Court held that the case was to be governed by the maritime law (179 U. S. 557-63). The Court then proceeded to inquire whether under the maritime law the city was liable for the damage done to the libellant's vessel. In its opinion the Court said, Mr. Chief Justice White writing (179 U. S. 565):

> "That, upon such a state of things, the relation of master and servant existed between the City of New York and those in charge of the fire boat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior*, is elementary."

Again the Court said (*id.*, 573):

> "A recovery can be had *in personam*, howeve
> for a maritime tort when the relation existing b
> tween the owner and the master and crew of t
> vessel, at the time of the negligent collision, w
> that of master and servant."

In the dissenting opinion in that case the general appl
cation of the rule *respondeat superior* to maritime tor
was not questioned. The only basis of the difference
opinion was the circumstance that the fire boat which d
the damage was actually being operated for the purpo
of getting to the scene of a fire and helping to extingui
it. The minority view was that this was the performan
of a governmental function and that a wrong done incide
to such a function was non-actionable under the maritim
law as well as under the common law (179 U. S. 585-6

In the case of *Vasey* v. *Mayor, etc., of Baltimo*
(*supra*), the District Court of Maryland (Judge Morri
sustained a similar libel *in personam* brought against t
City of Baltimore for damages sustained by the libellant
steamship in Baltimore Harbor as a result of being stru
by the *F. C. Latrobe*, a steamer owned and used by t
City of Baltimore for the purpose of breaking the ice a
keeping the harbor free from obstruction. The Cou
having determined that the navigation of the *Latrobe* w
negligent, proceeded to hold that the City was liable in
action *in personam* under the rule *respondeat superi*
So far as the opinion suggests any difference between t
common law application of the rule *respondeat superi*
and its scope in admiralty, the latter is indicated as t
more extensive. Thus the Court says:

> "The rule of the maritime law is that the own
> is always personally responsible for the negligen

or unskillfulness of those navigating his vessel except only those cases in which the possession and control of the vessel has passed to a charterer or other person so completely that the other person not only appoints the master and crew, but directs both the destination and employment of the vessel and her mode of navigation" (28 Fed., 378-9).

The English decisions are equally unequivocal in their holding that the rule *respondeat superior* is a part of the maritime law.

The case of the *M. Moxham* (*supra*), was a suit against a British vessel for damage done by negligently striking a wharf in a Spanish port. The question was whether the owners who employed the master and crew navigating the vessel could be held responsible. The form in which the question came up was upon the controversy as to whether the Spanish or the British law applied. It was necessary to determine that question because if the British law applied, the rule *respondeat superior* was applicable, and its operation would render the owners liable. If the Spanish law applied, the rule *respondeat superior* was not available and the owners could not recover. The Court held that the Spanish law applied and therefore dismissed the libel.

The case of *Smith* v. *Steele* (*supra*), was a suit by the executrix of a Thames pilot for his death which it was alleged was due to the negligence of defendant's servants in the management and operation of defendant's vessel. The defendants' vessel was lying at a dock and about to proceed on a voyage in which they were obliged by law to engage a pilot. They engaged the decedent in that capacity. He went aboard the vessel to give directions to the crew for getting the vessel out of the dock. While on the vessel, a boat which had been negligently slung fell

upon him and killed him. It is obvious that whatever rights accrued to the decedent or to his estate in consequence were based upon maritime law. Yet the plaintiff's executrix sued in a common law tribunal, the Court of Queens Bench. The defendants relied upon the fellow servant rule. The Court held that the deceased pilot was not a fellow employee of the crew or of the master of the defendant's vessel and upon that express ground allowed recovery.

2. Moreover, the application of the fellow-servant rule to maritime torts both in this country and Great Britain necessarily involves the application of *respondeat superior*, or at least negatives the contention that *respondeat superior* does not apply where the right to maintenance and cure does. The cases of injuries due to negligence as well as those due to wilful assault are within the field of maintenance and cure. If the rule *respondeat superior* does not apply to such cases, why has the application of the fellow-servant rule in those cases been declared by this Court (*The Osceola*, 189 U. S. 158; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, 258-9)? The appearance of the fellow-servant rule in these cases, notwithstanding the insistence of certain Law Review commentators ("The Extension of the Fellow-servant Doctrine to Admiralty", 18 Harv. Law Rev., 294; "*Respondeat Superior* in Admiralty", 19 *id.* 445; "The Common Law Courts and the Law of the Sea", 36 *id.* 777), is not accidental nor sporadic. The same rule has been applied by the English courts, *e. g.*:

> *Hedley* v. *Pinkney & Sons S. S. Co.*, A. C. 1894, 222.

In that case the owners were sued for injuries sustained by an employe caused by the captain's negligence in failing

to put certain stanchions and rails in place. The House of Lords held that he could not recover because the captain and he were fellow servants, citing, it may be noted, in support of that conclusion the decisions reached in certain non-maritime causes (*Wilson* v. *Merry*, L. R. 1 H. L. So. 326; *Johnson* v. *Lindsay*, 1891 A. C. 371).

3. Manifestly, there is nothing inherent in the right of a seaman to maintenance and cure which precludes him from relying on the rule *respondeat superior*. The right to maintenance and cure is an incident of the employment, derived in the first instance from necessity and interest as well as from considerations more humane—a sailor who is hurt or sick at sea or in a foreign port obviously cannot be put off the ship or allowed to starve on the ship. Indeed it has been noted that "the term *cure* was probably employed originally in the sense of *taking charge or care of* a disabled seaman and not in that of positive healing" (*The Atlantic*, Abb. Adm. 451 at 480, cited and quoted by Fitz-Henry Smith in an article on "Liability in the Admiralty for injuries to seamen", 19 Harv. Law Rev., 418 at 436). This is a kind of disability insurance and is paid for actually and ultimately, if not visibly, from the seamen's wages.

What is there about this right which excludes the seaman from the benefit of other rules of law available generally both at sea and on shore? In what possible way does the right to maintenance and cure conflict with the right to indemnity for injuries? No such conflict has been encountered in according the seaman redress for conditions amounting to unseaworthiness, or for injuries due to negligence—now that the fellow-servant rule has been abolished by statute. None apparently is found if he is assaulted by his captain (Petitioners' Brief, p. 7), but if it so happens

that the assault is committed by some other officer, the suggestion is that the seaman's right under maritime law to maintenance and cure is exclusive and that there is no right to receive compensatory damages, which could otherwise be recovered through the rule *respondeat superior*.

No reason for this eccentric exception to the operation of the rule *respondeat superior* is suggested, and no pertinent authority for such an exception is cited.

Moreover, the contention that there is any inconsistency between the right to maintenance and cure and the right to indemnity for injuries due to fault under the rule *respondeat superior* is conclusively negatived by the decisions of this court in the cases holding that under the Merchant Marine Act of 1920 the two rights are both preserved, and that even acceptance of the benefit of the right to maintenance and cure does not preclude a recovery by action for damages sustained and not compensated by the benefits so received. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375; *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130.

In the Peterson case (*supra*) this court, in its opinion, written by the late Mr Justice Sanford, sustained the right to recovery by a seaman who had already received his wages to the end of the voyage and had then been afforded maintenance and treatment by the defendant after the termination of the voyage. The Court said:

> "• • • there is no inconsistency between the right to recover compensatory damages under the new rule for injuries caused by negligence and the right to recover maintenance, cure and wages under the old rules, the remedies not being of such a nature that the adoption of one is a repudiation or negation of the other • • •. In short, the right to maintenance, cure and wages, implied in law as a con-

> tractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative" (278 U. S., 137-8).

4. Nothing in the opinion of this Court in the case of *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, lends itself to petitioners' argument. That case arose before the Merchant Marine Act of 1920, and decided the controversy as to the construction of the prior enactment, the La Follette Act of 1915, in particular the provision "Seamen having command shall not be held to be fellow servants with those under their authority * * *." The plaintiff contended that that act eliminated the fellow-servant rule and so entitled the plaintiff to recover. The defendant argued that the scope of the provision in the La Follette Act was much narrower; that it really intended merely to state that masters of vessels were not fellow servants of seamen. The Court adopted the latter and stricter construction, holding that:

> "The language of the section discloses no intention to impose upon ship owners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employees on shore."

The opinion relied on and reiterated the rule laid down in *The Osceola* and held that the La Follette Act had not changed that rule in any way applicable to the case.

That such was the sole import of that decision is further evidenced by the different result reached in cases arising under the Merchant Marine Act of 1920. The latter statute, extending to seamen suffering personal injuries in the course of their employment the provisions of the

Employers' Liability Act, abolished the fellow-servant rule in maritime relationships as completely as the earlier statute had done in non-maritime employments. This Court at once held that a seaman thereafter sustaining injuries by reason of negligence on the part of another of the ship's crew, committed in the course of the latter's employment, could recover indemnity for such injuries.

Panama R. R. Co. v. *Johnson*, 264 U. S. 375.

It is clear, therefore, as the Circuit Court of Appeals pointed out (364), that the only basis in admiralty, as at common law, for the elimination of the rule *respondeat superior* is the fellow servant rule. The determining consideration, therefore, is as to the scope of that rule. Does it apply, according to the import of its invariable form, only to cases of negligence or is it at this date to be extended to cases of wilful assault? That inquiry, moreover, must cover common law as well as maritime law, for it is clear that the scope of the rule is the same in this respect in these two jurisdictions. Indeed this Court, like the English courts, treats the rule as the same whether applied in a maritime or a common law case (*International Stevedoring Company* v. *Haverty*, 272 U. S. 50, 52).

5. The answer to the question whether the fellow servant rule extends to cases of wilful assault is, we believe, not doubtful. Neither in the *Osceola* nor in any other well considered case can authority be found for applying the fellow-servant rule as a bar to an action for an assault or other wilfully inflicted injury. On the contrary the overwhelming weight of authority, Federal and State, Common Law and Admiralty, is that the fellow-servant rule is inapplicable in an action brought by an employee against his

employer to recover damages for injuries wilfully inflicted by a co-servant.

Wolfe vs. *Thomas*, 268 Fed. 464, 467;
Memphis & N. Packet Co. vs. *Hill*, 122 Fed. 246;
Hall vs. *Sims* (*The General Rucker*), 35 Fed. 152;
The Vueltabajo, 163 Fed. 594;
Gabrielson vs. *Waydell*, 67 Fed. 342;
Spencer vs. *Kelley*, 32 Fed. 838;
Richard vs. *Amoskeag Mfg. Co.*, 109 Atl. 88 (N. H.) s. c. 8 A. L. R. 1426;
Palos Coal & Coke Co. vs. *Benson*, 145 Ala. 664, 39 So. 727;
Avondale Mills vs. *Bryant*, 10 Ala. App. 507, 63 So. 932;
Jebeles-Colias Confectionery Co. vs. *Booze*, 181 Ala. 456, 62 So. 12;
Tillar vs. *Reynolds*, 96 Ark. 358; 131 S. W. 969; 30 L. R. A., N. S. 1043;
Roberts vs. *Southern R. R. Co.*, 143 N. C. 176, 55 S. E. 509; 8 L. R. A., N. S. 798;
Fleming vs. *Tarboro Knitting Mills*, 161 N. C. 436, 77 S. E. 309;
Rogahn vs. *Moore Mfg. Co.*, 79 Wis. 573, 48 N. W. 669.

All of the maritime decisions above cited necessarily involve the exclusion of the application of the fellow-servant rule in cases of a wilful assault. In the case of *Memphis & N. Packet Co.* vs. *Hill* (*supra*), the defendant urged the fellow-servant rule as an objection to the plain-

tiff's judgment. The Circuit Court of Appeals for the Eighth Circuit in that case expressly held that rule inapplicable to the case of a wilful assault. The court in its opinion, Judge Thayer writing, after alluding to the contention that the fellow servant rule was applicable, said (122 Fed. at 247):

> "But this doctrine, we think, has no application to the case in hand. The injuries complained of by libellant were not occasioned by the negligent act of Wright while he and the libellant were working side by side as fellow servants, but they were wilfully and wrongfully inflicted when Wright was acting as an officer of the boat, to wit, as captain of the watch, having been placed in that position of authority by the mate, and by virtue of holding that office had the same power to give orders to the deck hands and direct them in what to do as the mate."

An examination of the cases above cited decided by the courts of various states discloses the same preponderance, a virtual unanimity, in support of the rule that the employer is liable to his employee for a wilful assault committed by a co-employee acting within the scope of his employment. In fact, this principle is so widely held that we have found no instance in which there was even discussion of the question as to the application of the fellow servant rule. That rule has invariably been stated as being to the effect that the employer is not liable to the employee for injuries caused by the *negligence* of a fellow servant. The only instance among the decided cases in either the common law or the maritime actions where the argument has been seriously advanced that the same rule applied in the case of a wilful assault was in *Memphis & N. Packet Co.* v. *Hill* (*supra*), where the Circuit Court of Appeals for the Eighth

Circuit rejected the contention on the ground that the fellow servant rule was not applicable to such a case.

The fellow servant rule, even when restricted to negligence cases, was of questionable soundness at its inception and has tended, with the subsequent progress of industry, to become less acceptable to the general policy underlying the legal responsibility of the employer. This tendency to restrict rather than extend the fellow servant rule is sufficiently attested by the limitations imposed by judicial decisions and by the successive legislative enactments which have curtailed and finally eliminated entirely in many cases the fellow servant exception to the employer's liability. In cases of wilful assault, this rule has never at any time received the sanction of the weight of judicial authority.

The scarcity of early cases holding the principal responsible for a wilful assault committed by his subordinate, noted by the Circuit Court of Appeals (362, 364) is not confined to the field of actions by an employee against an employer, but is also notable in the field of actions by third persons for such assaults (26 Cyc. 1527). Professor Wigmore in a series of articles in 7 Harvard Law Review, 383 *et seq.*, has argued that as late as the eighteenth century and the beginning of the nineteenth the prevailing test of an employer's responsibility to anyone for the fault of his employee was that of "the particular command", *i. e.*, did the employer order the servant to commit the particular tortious act complaint of? In other words, the rule *respondeat superior* in the true sense had not gained acceptance. While this view may well be extreme, since earlier decisions applying *respondeat superior* may be found, on the other hand cases much later occasionally disclose a reversion to the earlier test, *e. g.*, *Mali* v. *Lord*, 39 N. Y. 381, in which merchants owning and operating a great store

were held not liable for the act of their superintendent in causing the unjustified arrest and search of a customer suspected of shoplifting. The lack of early precedents for such cases as the one at bar is, therefore, not attributable to the operation of the fellow servant rule, but to the lateness of the development of the rule that the principal is liable for the tortious acts of his subordinate performed in the course of his functions as such representative.

A reference to the facts presented by some of the cases above cited will make clear that the law generally, as well as in the Federal jurisdiction, rejects and ignores the fellow servant rule in cases where the injured employee complains of a wilful assault committed by another servant of the common master.

In *Fleming* v. *Tarboro Knitting Mills* (*supra*) the court of last resort of North Carolina affirmed a judgment in favor of the plaintiff against his employer for an assault committed by the foreman under whom the plaintiff worked. There was a conflict in the testimony as to the precise circumstances of the assault. It was conceded and was the testimony of both sides that the foreman, one Mobley, went to the part of the floor where the plaintiff was employed as an operator of a number of ribbing machines, for the purpose of remonstrating with the plaintiff about his work and in particular to make him start up the machines which were then idle. Mobley's story was that the plaintiff assaulted him. The plaintiff's testimony was that Mobley struck him with a monkey wrench. The court in its opinion said (16 N. C. at 439):

> "We think from Mobley's own evidence that he went to see plaintiff in consequence of what Clark had told him and to remonstrate with plaintiff about his work and to compel plaintiff to start up the ma

chines. In doing so he was acting for the defendant and in prosecution and furtherance of defendant's business. If while so doing he violently assaulted plaintiff with the monkey wrench, as testified to by plaintiff, the defendant would be responsible for his act.

"This question was properly presented to the jury under very clear and appropriate instructions as follows: 'The master is not responsible for wrongs done by the servant while not acting within the scope of his employment. If the servant steps aside from his master's business, for however short a time, to commit a wrong not connected with such business, the relation of master and servant will be deemed to have been for the time suspended. The test is not whether it was done during the existence of the employment, *i. e.*, during the time covered by the employment, but whether it was done in the prosecution of the master's business. It is obviously a question of fact for the determination of a jury whether at the time of the particular act or omission by the servant which caused the injury the servant was acting within the scope of his employment or acting outside of it to effect some purpose of his own."

In *Richard* v. *Amoskeag Manufacturing Co.*, 109 Atl. 88, 14 A. L. R. 1426, the Supreme Court of New Hampshire sustained a judgment against an employer brought by an employee for an assault committed by his immediate superior, a superintendent. In that case the court, after quoting from previous opinions rendered in cases where the plaintiff was not an employee, said (14 A. L. R., at 1428):

"The same principle is applicable when the assaulted party is a co-employe, and not what is termed a stranger or third party."

The court referred to the principle applied in some cases to the effect that the use of excessive force in the exercise of delegated authority renders the master liable if the employee so abusing his authority was actually authorized to use some force. The court concluded that, even thus limited, the facts of the case justified the judgment in favor of the assaulted employee. The court, however, continued (14 A. L. R., at 1429):

> "But the principle applied in cases of this character has been stated to depend, not upon the question whether the master authorized the employee or agent to use force, but upon the question whether the latter used the force complained of as a means of doing what he was employed to do."

This portion of the opinion touches upon the question of scope of employment, to which we shall refer later (Point II, *post*). Its importance at this point is in showing that the fellow servant rule is not applicable to a case of wilful assault.

5. A further basis upon which liability might be predicated is the violation of the duty to protect. Such a duty, the petitioners do not deny, rested upon the captain and would be violated by an assault which he himself committed or knowingly permitted or even which he negligently failed to prevent when put upon notice that it would be likely to occur.

It is submitted that this duty is one which extends beyond the captain and applies to any officer who is in charge of subordinate members of the crew. If, however, it be thought that such a duty cannot be regarded as a part of the admiralty law, it follows that the absence of any such general duty of protection renders more important the ad-

herence to the application of the rule *respondeat superior* which has already been made by the courts and which the petitioners now ask this Court to disavow. In this connection attention is again called to a careful and informing analysis of the problems characteristic of such cases as the one at bar. (Liability in the Admiralty for Injuries to Seamen, 19 Harv. Law Rev., 418.) In that case the commentator, after discussing the extent of the duty of protection, said (*id.*, 440):

> "It might be well for the uniformity of the maritime law if the rights of seamen to general damages for personal injuries were made to depend entirely upon contract, but until the highest courts sanction a construction of the shipping contract so liberal as to include the duty of good treatment in its most comprehensive sense, his rights must be governed in part by the law of agency."

6. It is a familiar rule of statutory interpretation that:

> "A construction placed upon a statute by inferior courts and long acquiesced in will generally be upheld, especially where the adoption of a different rule would cause great mischief." (36 Cyc. 1143.)

It is suggested as a proper corollary to this rule and one springing naturally from the application of the same principle of acquiescence, that where over a long period of years certain rulings have prevailed in the courts and thereafter a statute has been passed amending the law as so laid down in certain respects, there should be reluctance to change the law in other respects by judicial action in such a way as may limit the remedial value of the legislation passed with a purpose to maintain and approve such features of the judicial holdings as were not affected by the

remedial provisions. This situation is presented her
The courts have held the fellow-servant rule applicable t
negligence cases and not to cases of wilful assault. Sta
utes have been passed admittedly eliminating the fellow
servant rule in negligence cases. It is submitted that th
courts should not now, in the absence of any compelling re
son, recognize that rule as applicable to cases of wilf
assault.

POINT II.

**Assuming that prior to the enactment of the Mercha
Marine Act of 1920 the employer, upon such facts as a
presented at bar, might have avoided liability by invokin
either the Fellow Servant Rule or an exception to th
operation of the rule *respondeat superior*, it is manife
that the operation of that Statute is fatal to both of the
defenses, and that the petitioners are now liable und
these Statutes, if they were not before, for indemnity
the same extent as if the employment had been no
maritime and the action governed by the principles a
plicable on land.**

The Merchant Marine Act of June 5, 1920 (41 Stat. 1
U. S. Code Annotated, Title 46, Section 688; Mason's Co
Volume 3, page 3273, provides:

> "Any seaman who shall suffer personal injury
> the course of his employment may, at his electi
> maintain an action for damages at law with the ri
> of trial by jury, and in such action all statutes of
> United States modifying or extending the comm
> law right or remedy in cases of personal injury
> railway employees shall apply * * *."

This Court has held (*Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 391-2; *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50) that the foregoing statute incorporates in the maritime law and makes available to a seaman seeking compensation for injuries the following provision of the Federal Employers Liability Act of April 22, 1908, 35 Stat. 65, U. S. Code Annotated, Title 45, Section 51, Mason's Code, Volume 3, page 3064:

> "Every common carrier by railroad while engaging in commerce between any of the several states or territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

The respondent at bar is, it is submitted, clearly entitled to invoke the foregoing statutory provisions, and the application thereof is fatal to either or both of the major objections urged by the petitioners.

Neither the objection that the rule *respondeat superior* does not apply to a seaman seeking indemnity for injuries due to a wilful assault, nor the objection that the fellow servant rule is applicable to an action for such injuries can survive the application of this statute.

A.

The rule *respondeat superior* is made available (if it was not before) to a seaman in the position of the respondent by the following words of the Merchant Marine Act itself:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law," etc.

It is in this provision, if in any, that this statute extends the rule *respondeat superior* to seamen seeking compensation for injuries. The provision of the Employers Liability Act incorporated in the statute by reference has the effect according to its literal terms only of eliminating the fellow servant rule. Yet, the decisions of this Court sustaining recovery in cases of negligent injury to seamen by reason of this statute, show that the rule *respondeat superior* applies now, if it did not before, to such cases. The only language importing the introduction of that rule even by implication is that above quoted from the Merchant Marine Act itself. *That language, it is to be observed, contains no words restricting its operation to negligence cases.* If it introduces the rule *respondeat superior* in the case of a personal injury resulting from negligence, it must equally have the same effect as regards an injury resulting from a wilful assault, for the statute itself contains no limitation justifying admitting one and excluding the other.

B.

If, on the other hand, the rule *respondeat superior*, as we contend, is and was, prior to the statute, a part of the maritime law as regards rights of seamen, it follows that the real basis of the right of a seaman injured by negligence since the Merchant Marine Act of 1920 is the abolition of the fellow servant rule. In that case the fellow servant rule is abolished not merely in negligence cases, but, if it ever existed in cases of wilful assault, in those also.

This follows by reason of the fact that the Employers

liability Act uses precisely the same terms in referring to the fellow servant rule as the decisions in which that rule was defined and applied. Those decisions invariably refer to the fellow servant rule as constituting a defense to an action by an employee for personal injuries due to the negligence of a co-employee. If the word "negligence" in those decisions includes also wilful assault, it has the same inclusiveness in the remedial legislation obviously intended to change the rule. It is mere special pleading to argue that the word "negligence", in the decisions where the fellow servant rule is stated, includes wilful assault, and that in the remedial legislation the same term is restricted to cases of negligence in the sense of inadvertent fault.

C.

A further reason more persuasive than either of those above stated supports the extension to cases such as the one at bar of the Merchant Marine Act together with the Employers Liability Act to which it refers. That is the obvious purpose of Congress, to give to seamen the same protection which employees in non-maritime pursuits receive and to impose upon the employers of seamen the same obligation and interest respecting the avoidance of unnecessary injuries which are placed upon employers of workmen in non-maritime occupations. This purpose of this statute has already received judicial recognition in this Court and in others. (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; *Encarnacion* v. *Jamison et al.*, 251 N. Y. 218 (s. c. *Jamison* v. *Encarnacion*, No. 395 on the current calendar of this Court).)

Of course it was not necessary to plead these statutory provisions (*Mo. Kans. & Tex. Ry.* v. *Wulf*, 226 U. S. 570,

576; *Second Employers' Liability Cases*, 223 U. S. 1, 53). It was sufficient to plead the essential facts which under the statutes entitled the plaintiff to recover.

POINT III.

The evidence established that Jackson, in committing the assault upon respondent, was acting within the scope of his employment.

The question whether the subordinate in committing the particular act complained of was acting within the scope of his employment is ordinarily one of fact. The question in its elements is not unlike the question of proximate cause. That this question as to scope of employment was one of fact in this case is clear from the decisions already cited (Point I, p. 21, *ante*).

All of those cases were cases of assault upon one employee by another. All of them, possibly excepting *Wolfe* vs. *Thomas*, 268 Fed. 464, *The Vueltabajo*, 163 Fed. 594, and *Spencer* v. *Kelley*, in which the assault was committed by the captain, are clearly in point, to the effect that the assault upon respondent was committed by Jackson while acting within the scope of his employment as an officer of the *Alpha* and an employee of the defendants. We shall not repeat the evidence at length. It suffices to recall that Jackson and respondent were both required to be on duty at the time when the assault actually occurred. Jackson had just come from the engine room and was attempting to secure a full engine room crew which was lacking because of respondent's absence. Jackson accordingly went after respondent, hollering to him to come

down (198). Jackson struck him for the purpose of compelling his attendance, of punishing him for his failure to report on time, and to insure compliance with the ship's routine both on his part and on the part of others of the engine room force. When Cain ran from him, Jackson followed, notwithstanding his claim that he was going to get a wiper, yet, he says, there was a wiper sitting up on the deck by the engine-room housing (199). At any rate, from all the facts, the jury were fully justified in drawing the inference that such was Jackson's purpose and in concluding that he was attempting to exercise effectually his authority, to perform the functions as an officer for which he was employed, and in particular to get his engine room manned fully for the expected departure of the ship.

The situation shown at bar was certainly as indicative of Jackson's functioning as an employee as were the corresponding facts in the cases of *The General Rucker, Memphis & N. Packet Co.* vs. *Hill,* and in all of the State Court decisions which we have cited. These decisions and the quotations from certain of the opinions disclose that whether a servant is acting within the scope of his employment does not depend upon the question whether the master authorized the offending employee to use force, but upon the question whether "he used the force complained of as a means of doing what he was employed to do" (*Richard* vs. *Amoskeag Mfg. Co.,* 14 A. L. R. at 429). See, to the same effect, the opinion of the Supreme Court of Canada in the case of *Hudson Bay* vs. *Vaillaincourt,* 2 Dom. L. R. N. S. These decisions and expressions of opinion also make clear that the offending act is not taken out of the scope of the servant's employment either because of an accompanying display of temper (*Jebeles Colias Conf. Co.* vs. *Booze,* 181 Ala.

456), or because of its criminal character—it was a crime in every one of the cases cited—or because it was not authorized or ratified by the employer.

Besides the cases which we have cited in actions between master and servant we may resort in determining the question as to scope of employment to cases of third persons assaulted by the servants of the defendant. So far as regards scope of employment and the application of the rule *respondeat superior*, the question is the same whether the person injured by the offender's wrongful act is one of his co-servants, or a stranger. The question of law remains the same. An examination of the cases in which a stranger to the employment has sued the employer in consequence of an assault committed by an employee discloses the statement and application of precisely the same rule as regards what does and does not fall within the scope of the offender's employment. We call the court's attention to the following typical cases:

Phila & Reading R. Co. v., *Derby*, 14 Howard, 468, 486;

Steamboat Co. vs. *Brockett*, 121 U. S. 637, 645;

Chesapeake, etc. R. R. Co. vs. *Stojanowski*, 198 Fed. 77;

Magar vs. *Hammond*, 183 N. Y. 387, 390-1.

To the same effect are the English cases, *e. g.*:

Bayley vs. *Manchester, etc. R. Co.*, L. R. 8 C. P. 148, 28 L. T. 366;

Dyer vs. *Munday*, 64 L. J. Q. B. 448 (1895), 72 L. T. 448.

In *Steamboat Company* vs. *Brockett* (*supra*), the United States Supreme Court, Mr. Justice Harlan writing, said (121 U. S. at 645):

> "Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, 'if,' as we adjudged in Philadelphia & Reading Railroad *vs.* Derby, 14 How. 468, 486, 'it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment'."

The English cases apply the same test as to the application of the rule *respondeat superior*. In *Dyer* vs. *Munday* (*supra*), the defendant's business was that of selling furniture on "the hire-purchase system". The purchaser of a bedstead from defendant had left it at plaintiff's lodging house as security for arrears of rent. One of defendant's employees going to the lodging house to recover possession of the bedstead assaulted the plaintiff. For the assault he was convicted and sentenced to pay a fine, which he did. In the civil action the Court of Appeals held the defendant employer liable. The Master of the Rolls (Lord Esher) in his opinion said (italics ours):

> "The fact that what was done was a criminal offense may be material for the consideration of the jury, but the mere fact that it was a criminal offense does not take the case out of the general rule. *The question is not whether the act was within the authority of the servant.* The authority of the servant is to do what he is told and to do it properly. But the law says that if a man, who is employed to do a thing

> properly, in the course of his employment exceeds his authority, then the master is liable. The law has always been so laid down" (Opinion, 72 L. T., at p. 449).

Lopez, L. J., said in the same case:

> "It is perfectly clear that the question whether acts are, in fact, within the scope of the employment of a servant, is one for the jury, but that the question whether the particular acts can be within the scope of the employment is for the judge. * * * Now the law is, that all acts of a servant done in the course of his employment, and in furtherance of the employment, and in the master's interest, are within the scope of the servant's employment, and that the master is liable for such acts, although they may be contrary to his express orders, and amount to a criminal offense" (*id.*).

All three of the justices constituting the Court of Appeals cited, with approval, the case of *Bayley* vs. *Manchester, etc., R. Co.* (*supra*) in which the railroad was held liable for the act of a porter in wrongfully removing a passenger from his compartment and putting him off the train. The overwhelming weight of authority is in agreement with these cases and with the authorities which we have cited in the previous point.

We call attention to a clear statement of the same rule by the New York Court of Appeals in *Magar* v. *Hammond*, *supra*. In that case the court said, Chief Judge Cullen writing (183 N. Y. at 390-1):

> "To render the defendant Hammond liable for the wilful, reckless or wanton act of Tompkins, the act must have been done by Tompkins in the scope of his employment, and whether it was so done should

be submitted as a question of fact to the jury. (Craven *v.* Bloomingdale, 171 N. Y. 439.) If Tompkins, not having the interests or services of his master in mind, and acting maliciously or in order to effect some purpose of his own, shot the plaintiff, then his master, the defendant Hammond, is not liable for the act; but if his act was within the general scope of his employment and done with a view to the furtherance of his master's business, then Hammond is liable whether the act was wilful, wanton or reckless."

POINT IV.

Petitioners' suggestion that liability on their part for the assault is excluded by the corporal punishment statute (Title 46, Section 712, United States Code Annotated) involves a forced construction and extension of that statute and is plainly untenable.

Petitioners' argument (Petitioners' Brief, pp. 31-4), based upon this statute, last amended on March 4, 1915, cannot withstand the most superficial examination. The statute in certain circumstances creates a liability against the owner, captain, etc., irrespective of any question as to the scope of employment. It gives a lien against the vessel. It certainly does not by implication repeal or outlaw any right that existed on March 4, 1915, much less does it limit the effect of the later Merchant Marine Act of 1920. Counsel can hardly expect the suggestion that Congress provided this remedy in view of the non-liability of maritime employers to be seriously considered.

CONCLUSION.

The judgment under review should be affirmed.

Respectfully submitted,

THOMAS J. CUFF,
Attorney for Respondent.

VINE H. SMITH,
MILTON PINKUS,
DIX W. NOEL,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 457.—October Term, 1929.

Alpha Steamship Corporation, William H. A. Walker and Frank Daly, etc., Petitioners,
vs.
Robert Cain.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 26, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent was a seaman employed as a fireman on the American steamship Alpha navigating the high seas. The corporation petitioner owned and operated the vessel and the other petitioners were in possession of her. Respondent sued petitioners in the federal court for the Southern District of New York to recover damages for personal injuries caused by an assault upon him by his superior, one Jackson, an assistant engineer in charge of the engine room. The complaint charged and the evidence was sufficient to warrant a finding that Jackson was authorized by defendants to direct plaintiff about his work and that, for the purpose of reprimanding him for tardiness and compelling him to work, Jackson struck plaintiff with a wrench and seriously injured him. That was the basis of fact upon which the jury under the charge of the court was authorized to find for plaintiff. The jury returned a verdict in favor of plaintiff for $12,000 and the judgment thereon was affirmed in the Circuit Court of Appeals.

That court expressed the opinion (35 F. (2d) 717, 721) that § 33 of the Merchant Marine Act, 46 U. S. C., § 688, and the Federal Employers' Liability Act, 45 U. S. C., §§ 51-59, did not apply and held defendants liable under the general maritime law without regard to these Acts. But in *Jamison* v. *Encarnacion*, decided this day, we hold that such an assault is negligence within the meaning of § 1 of the Federal Employers' Liability Act which is made

available to seamen by § 33 of the Merchant Marine Act. The ruling in that case controls in this. We need not examine the grounds upon which the Circuit Court of Appeals put its decision.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.